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In The Supreme Court Of The United States

OCTOBER TERM 1996

SHAWN PAUL NOVAK,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE LOWER COURTS ERRED IN ADMITTING SHAWN NOVAK'S STATEMENT WHICH WAS OBTAINED IN VIOLATION OF THE CONSTITUTIONAL RIGHTS GUARANTEED TO HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

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OPINIONS BELOW

Prosecution of Shawn Novak was commenced in the Virginia Beach Juvenile and Domestic Relations Court, a court not of record. Jurisdiction was transferred to the Virginia Beach Circuit Court where both the hearing on the motion to suppress and trial of the defendant were had. On January 6, 1991 Shawn Novak filed a motion to all the "alleged evidence in this cause on the grounds that any and all evidence was seized or obtained without probable cause or based upon an unlawful or unreasonable search, seizure or interrogation in contravention of the rights and privileges accorded the defendant under the United States and Virginia Constitutions."

On February 3, 1992 a hearing on the motion to suppress was had. The trial court heard testimony from the defendant's mother, Jenny Novak and from Detective Hoffman. Admitted into evidence were the video tape of Shawn Novak's confession, the transcript of said video tape and summaries of witness interviews which were conducted prior to the interrogation of Shawn Novak. The hearing extended to February 4, 1992. On that same date, the trial court denied said motion. The findings of fact and the ruling of the trial court are contained on pages 35-43 of the Appendix, hereinafter referred to as A__.

The capital trial of Shawn Novak was commenced on March 2, 1992 and on March 9, 1992 the jury returned a verdict convicting Shawn Novak of capital murder as charged. On May 4, 1992, upon consideration of a presentence report and argument presented by counsel, the trial court sentenced Novak to life in prison for the capital murder of Danny Scott Geiger and Scotty Weaver. The case was held open pending any post trial motions. When no motions were forthcoming, final judgment was entered on

June 15, 1992.

Novak timely filed a petition for appeal to the Virginia Court of Appeals. Said petition was granted; among other issues, the Virginia Court of Appeals agreed to consider whether the admission of Shawn Novak's confession violated the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. By opinion dated May 23, 1995 a three judge panel of the Virginia Court of Appeals affirmed the trial court's ruling that the admission of the confession did not violate the rights guaranteed to Shawn Novak under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Judge Benton, one of the three judge panel, dissented from the majority opinion. Said opinion is attached in its entirety. (A- A34).

Novak timely filed a petition for appeal to the Virginia Supreme Court. By order dated January 10, 1996 the petition was denied.(A1). Novak then filed a petition for rehearing which was also denied by order dated March 1, 1996. On May 17, 1996, Novak filed a motion for an extension of time within which to file a petition for a writ of *certiorari*. On May 22, 1996 Chief Justice Rehnquist extended the time to and including July 1, 1996.

JURISDICTION

The judgment of the Virginia Supreme Court denying petitioner's appeal was entered on January 10, 1996. A petition for rehearing was denied on March 1, 1996. This Court extended the time to file a petition for a writ of *certiorari* to and including July 1, 1996. This Court's jurisdiction is invoked pursuant to U.S.C. Section 1257, petitioner having asserted below and asserting herein a deprivation of rights secured by the United Sates

Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States which provides in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life; liberty or property without due process of law

2. This case also involves the Sixth Amendment to the Constitution of the United States which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

3. This case also involves the Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

> No state shall make or enforce and law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life liberty, or property without due process of law.

STATEMENT OF THE CASE[1]

On Monday, March 4, 1991, two boys, Daniel Geiger, age nine, and Christopher Weaver, age seven, were reported missing in the City of Virginia Beach, Virginia. Their bodies were found on March 5, 1991. The boys were killed by multiple stab wounds. On March 9, 1991, Shawn Paul Novak (hereinafter referred to as Shawn) confessed to the two homicides. Shawn, a juvenile, had just turned 16. It is that confession, the events leading up to, and the circumstances surrounding that confessions which are at issue in this case.

On March 6, 1991, homicide detective Hoover called Shawn's mother, Jenny Novak, at her place of employment and requested permission to speak with her children. She said, "No," and repeated that response several times as the detective argued with her on the phone, insisting that such questioning was routine. Hoover never told her that he was calling from her house and in fact, had already begun questioning her children. Mrs. Novak discovered this fact by calling her home and talking to her son, Shawn's brother. He told her that the police were at that moment questioning Shawn in their police car. When Mrs. Novak arrived home a short time later, the police were gone and her son Shawn was at home. (A133 -35).

Hoover returned later that evening and requested Mrs. Novak's permission to take Shawn to the police station. "[The detective] wanted to take [Shawn] out in his car and

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[1] The Statement of the Case is based almost entirely on the evidence adduce at the hearing on the motion to suppress, had on February 3-4, 1992.

buy him a hamburger and talk to him alone. I refused to let him do that. He kept insisting that he had to talk to him alone." The detective told Mrs. Novak he needed to talk to Shawn alone because he might not admit to having engaged in certain delinquent activities if she were present.(A135-36). The detective took Mrs. Novak outside and again began arguing with her, insisting that Shawn must come to the station. (A A135-36). Although Mrs. Novak refused to allow the detective to transport Shawn to the station, she finally agreed to take Shawn herself. (A136). Mrs. Novak requested that she be present during all questioning of Shawn. The police ignored Mrs. Novak's requests and excluded her from the two hour interrogation that evening. (A136). When the police returned Shawn to his mother, they told her that Shawn had become upset because "he had misunderstood something the detective had said." (A137). The police said that they were ceasing the interview at that time due to the late hour and the fact that Shawn "needed to go home and get his rest." They requested permission to speak with Shawn again and Mrs. Novak again told them that she was to be present during all questioning of her son. (A138).

The following day, Thursday, March 7, the police again ignored Mrs. Novak's express request that all questioning take place in her presence. They waited for Shawn to arrive home from school, and again called Mrs. Novak from inside her home after the questioning had already been initiated. She demanded that they leave her home which they did. (A138-39).The police called Mrs. Novak shortly after she arrived home. Detective Tucker first apologized profusely for Detective Hoover's conduct, assuring her that his roughshod manner was "all a mistake." (A139). He then asked her to bring Shawn to the station, which Mrs. Novak refused to do. After two or three more telephone calls from the police Mrs.

Novak relented, agreeing to a station house interview, on the condition that she be present during the questioning. (A139-40). Again that request was ignored and she was again excluded from a two hour interrogation of her son. Mrs. Novak testified that following that interview, Shawn "felt good" about having been able "to help." (A140).

On Friday, Detective Tucker called Mrs. Novak and convinced her to bring Shawn down to the station that evening. Mrs. Novak testified that Hoover was "very nice" during this conversation. (A141). Mrs Novak was delayed in getting Shawn to the station and she testified that the police "kept calling" her. Finally she told them she was unable to take Shawn to the station and told them she would come the following morning. They said that was fine.(A141). Shawn was interrogated at the station the following morning, Saturday, March 9, 1991, and it was during the course of this interview that he confessed to the crime.[2]

Mrs. Novak stated that she only allowed this final interview to take place because of the representations of the police. The police repeatedly told her that Shawn was not a suspect. She stated,"They kept assuring me that I was being overly worried, that I was maybe even paranoid, **that there was no reason for me to be concerned about Shawn because <u>he was not a suspect"</u>**. (A142-43) (emphasis added).

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The entirety of this interview was videotaped with audio. Neither the attached transcript of that interview, nor the attempt at description by this author, begins to capture the compelling circumstances surround this interrogation. A copy of the tape has been submitted to this Court. Petitioner respectfully requests and urges this Court to view said tape.

At no time during this interview, prior to his admission of guilt, was Shawn, or his mother, advised of Shawn's is constitutional rights. The Commonwealth presented no evidence that his rights were read to him any time prior to Saturday. Shawn had no prior experience with the criminal justice system. He had never before been charged with a crime or been interrogated. (Pages 302-3 of the joint appendix presented to the Virginia Courts). He had never previously had the need to exercise his Fifth and Sixth Amendment rights. Notwithstanding his lack of experience with the criminal justice system, Shawn was very bright. He was in tenth grade honors programs and had scored very high on standardized tests administered to Virginia students. (A155).

At the suppression hearings, the police denied that Shawn was a suspect when he arrived at the police station Saturday morning. This assertion strains incredulity. The police had compiled a vast amount of information on Shawn prior to the Saturday interrogation and of which Hoffman was aware when he interrogated Shawn. (A189-194). They interviewed a number of people specifically for the purpose of obtaining information about Shawn. The gathered information strongly implicated Shawn's involvement in the crime. The interview summaries are contained in the Appendix. The police interviewed John Cleapor. (A111-18); James Young and his mother, Mrs. Beery (3 interviews, A119-23,131); Jennifer Whitworth (A124); Edna Lawrence, one of Shawn's teachers (A126-28); and Jammie Allen. (A129). The interviews focused almost entirely on Shawn, though initially there seemed to be some interest in John Cleapor. Other than Shawn, John Cleapor was the only one of these individuals interviewed at the police station. Mrs. Beery was interviewed three times, each time almost exclusively about Shawn. The

interviews revealed that Shawn had told a number of people that he was the last person to have seen the boys alive and that he was the one who discovered their bodies, a fact which the police knew to be untrue. The information from the interviews revealed that Shawn often exhibited very bizarre behavior which suggested mental disturbance. On one occasion, Shawn was found standing in a trash can, alone in a darkened classroom. They were also aware that Shawn had been frequently seen talking to inanimate objects and had worn a necklace with a dead birds head on the end. Indeed, intensive psychological testing revealed Shawn to be a very disturbed child and the judge so found on the day of his sentencing.

Armed with this vast compilation of incriminating information, the police interrogated Shawn on the morning of Saturday, March 9. Mrs. Novak escorted her son to the interrogation room and initially refused to leave that room despite Detective Hoffman's entreaties that she do so. (A45-47). Hoffman initially told Mrs. Novak that Shawn was "not under arrest." (A45). However, Hoffman never told Mrs. Novak that Shawn was free to leave or free to terminate the questioning at any time. Hoffman tried to convince Mrs. Novak to leave the interrogation room, initially to no avail. Hoffman told Mrs. Novak that the interviews with Shawn were strictly routine and were being conducted to prompt Shawn's memory about details regarding other people's activities. He told Mrs. Novak that it was necessary to talk to Shawn alone so he would not feel uncomfortable in relating delinquent activities engaged in by himself and his friends.(A45-46). Hoffman said he had interviewed other kid's five or six times in relation to this case, although the record belies that assertion. (A45). Mrs. Novak responded that the failure of the police to honor her wishes up to that point concerned

her. She also stated that their persistence made her suspicious. somewhat suspicious. For those reasons she wanted to stay. (A46). Hoffman stated that he was not trying to hide anything from her. He tried very hard to convince her that her refusal to allow him to speak with Shawn alone would hinder his investigation of the murders, telling her that he had already lost an entire day because another parent had refused to allow him to talk to his child alone. (A47). He then stated, "There are certain things that I would like to get clarified, and you know, [your presence is] going to inhibit me and I hope I don't lose anymore time with this. I've got to get rolling on this thing." Finally he told Mrs. Novak that he would not and did not employ improper interrogation techniques. He suggested that she had seen too many movies. Mrs. Novak insisted on staying and the interview commenced with her in the room. (A47).

The interrogation was conducted in a very small room, with Mrs. Novak seated against a wall facing the detective who appeared to be leaning on a table, and whose back was to the camera. The precise dimensions of the room are not clear as Hoffman's testimony on this point varied greatly; it was either 10' by 12', or 8' by 10' or 7' by 8'. (App. 834-5, 862, 494). Shawn was against a far wall to his mother's left and the detective's right. The door was to Mrs. Novak's right.

The initial portion of the interrogation consisted of very routine and matter of fact questions asked and answered in normal conversational tones. Hoffman would ask three or four questions and then pause to make notes He rarely interrupted Shawn (A47-60). Shortly into the interview Hoffman turned and addressed Mrs. Novak in a tone of annoyance, asking rhetorically whether she understood why

these interviews took so long. (A50). Shawn's demeanor was very relaxed and casual. Thirty after the commencement of the interview, Hoffman asked Mrs. Novak if she felt comfortable, to which she responded, "Yes, now." Hoffman then reiterated his need to speak with Shawn alone and invited her to discuss it with Shawn. (A60-63). Hoffman left the room and upon his return again implored her to leave. He again suggested that her failure to do so would hinder his investigation. (A61-62). He expressly stated that Shawn would not be asked any questions about the two boys.(A60, A161). He further stated that no improper interrogation techniques would be employed. (A61). Hoffman tried to persuade Mrs. Novak to leave the station, but that she refused to do, although she was finally persuaded to leave the room The transcript does not begin to capture Mrs. Novak's very obvious reluctance to leave the room. The video tape demonstrates very clearly that she did not want to leave her son in that room alone with Hoffman. But Hoffman finally prevailed; Mrs. Novak, with obvious misgivings, left the interrogation room.

Upon Mrs. Novak's departure, Hoffman seated himself directly in front of Shawn at a distance of no more than six to twelve inches from them. He placed himself between Shawn and the only door out of the room. He literally had Shawn up against the wall. The tenor of the interrogation began to change. Previously, Hoffman had frequently paused between questions and had rarely interrupted Shawn. Now, the pace increased. The questions became more pointed and quickly followed Shawn's answers. Hoffman frequently interrupted Shawn. The questions became more confrontational in tone and substance. Significantly the first questions after Mrs. Novak's departure were about the murdered boys.(A63). Hoffman took a break thirty or so minutes after Mrs. Novak had departed. Twice he told Shawn to go let his mother know

he was okay. He said, "Let's just say 'hi' to mom so we won't be upset and nervous and everything."(A83).

Following that break, the intensity of the interrogation changed drastically. Hoffman confronted Shawn with inconsistencies between his statements and the statements of others. He interrupted Shawn frequently. He began gesticulating his hands directly in front of Shawn's face, bearing down on the child physically. Although Shawn had, up to this point, appeared relaxed, now he was not. Shawn now became apprehensive. He pressed his body against the dy against the back of his chair in an effort to to distance himself from the increasingly aggressive detective. The remainder of the interrogation consisted of Hoffman confronting Shawn with inconsistencies and telling Shawn lies regarding evidence possessed by the police. It is significant that Hoffman did not tell Shawn any lies until mom's departure. After her departure he told at least three. He told Shawn that the police had observed him at the search.(A90). That was a lie. (A162, A170) He told Shawn there was a witness who had seen him with the boys on Monday. That was a lie. (A162, A171). He ttold Shawn one of his fingerprints was on one of the bodies. That was a lie. (A162, A170-71). Interspersed through all of that were repeated assurances that Hoffman was not trying to trick Shawn and that Shawn was not a suspect.

This aggressive questioning culminated with Shawn's admission that he had found the bodies before the searchers did and he picked them up and hid them. At that point, Hoffman's voice became very soft and soothing. Shawn admitted cutting branches and placing them over the boys. Hoffman continued to speak in a soft soothing tone; Shawn was crying. Hoffman asked, "You killed them, didn't you?" Shawn, nodded affirmatively. . A knock interrupted the interrogation. Hoffman exited the room and Shawn was left in

the room alone, sobbing. Hoffman returned. In a barely audible voice, he read Shawn his Miranda rights as Shawn was leaning over, head in his hands, still crying. Asked if he understood these rights, Shawn nodded. This was the first and only time Shawn was read his rights. Hoffman asked whether Shawn wanted someone to tell his mother and Shawn said, "Let her know." (A107). The interrogation continued for at least sixteen more minutes. In that time Shawn revealed the details of the alleged crime.

The police either did not immediately inform Mrs. Novak of her son's confession or they continued to question Shawn after she demanded they stop. Mrs. Novak testified that as soon as she was informed of the confession, she demanded that all questioning cease. Mrs. Novak was told by the police that Shawn was in the room alone at that time, and that "Hoffman was so shocked at hearing this from Shawn that he almost passed out. He was so pale when he stepped out of the interrogation room."(A154).

Although Shawn was not read his rights prior to admitting that he had killed the boys, he was, by Hoffman's own admission, a suspect well before that point. At the juvenile hearing Hoffman testified that Shawn became a suspect at the point in time immediately preceding his lie to Shawn regarding Shawn's fingerprints. (See, A180). That point in time was at least thirty minutes prior to the time at which Shawn was advised of his rights. Hoffman did concede that he was of suspicious of Shawn before the final interview.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

A. Introduction

Shawn Novak had turned 16 only a few weeks prior to confessing to the crimes of which he was ultimately convicted. Accordingly, we first look to the first issue to be addressed is the particular vulnerability of children in dealing with the police. The next issue explored is the voluntariness of the confession. An analysis of the law as applied to the particular facts in this case makes it abundantly clear that Shawn Novak was in custody at the time of his interrogation, was never advised of his constitutional rights and gave a confession against his will. Further, the analysis will reveal that the police engaged in a deliberate course of conduct calculated to deprive Shawn of his mother's counsel in violation of the Sixth Amendment. Finally, the split among the states' highest courts will be examined. As far as Petitioner can ascertain, Virginia stands alone in finding that a confession given by a juvenile when his mother was excluded against her will, was noncustodial and voluntary.

B. THE INTERROGATION OF CHILDREN

This Honorable Court has long recognized the particular vulnerability of children confronted by police interrogation tactics. In Haley v. Ohio, 332 U.S. 596 (1948), this Honorable Court stated:

> And when as here, a mere child - an easy victim of the law-- is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe

> and overwhelm a lad in his early teens. This is the period of great instability which the crises of adolescence produces. ... He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.

Id. at 599.

Recent empirical studies have confirmed why special care must be taken in the interrogation of juveniles. They are particularly vulnerable to overbearing police tactics. A 1969 study in San Diego concluded that only a small percentage of juveniles are capable of knowingly and intelligently waiving *Miranda* rights." Ferguson & Douglas, "A Study of Juvenile Waiver," 7 *San Diego Law Review* 39, 54 (1970). The authors summarized the study by concluding that "within this project, 86 of 90 juveniles freely and voluntarily waived their constitutional rights. Of the 86, only 5 achieved an understanding score of 10. In other words, 81 of the 86 by achieving scores of less than 10, did not consciously and fully understand their rights." Id. at 53. A more recent and comprehensive study sought "to provide empirical information with which police, lawyers, judges, and legislative lawmakers could address the question of juveniles' competence to waive *Miranda* rights." Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence* 8 (Plenum Press: 1981). Following an extensive study on the ability young people to comprehend their interrogation rights, the author concluded that the majority of juveniles 14 years or younger were not competent to waive their rights to silence and counsel. The results similarly raised questions regarding the competence of juveniles aged 15 to 16, to waive those rights, especially in those cases where the juvenile had little or no prior contact with the police. *Id.* at 203-204.

Dr. Gary Melton, the leading authority on the interface between child psychology and the legal system, found Grisso's methodology to be most credible and his conclusions inevitably dictated by the results of the study. Melton, "Making Room for Psychology in *Miranda* Doctrine: Juveniles' Waiver of Rights," 7 *Law and Human Behavior* 67 (1983). A recent study examined the ability of 115 learning disabled and non-learning disabled youths from five high schools in four school districts in eastern Virginia. Zaremba, *Comprehension of Miranda Rights by 14-18 Year Old African-American and Caucasian Males With and Without Learning Disabilities* (Unpublished Doctoral Dissertation, School of Education, The College of William and Mary, 1992). Building on Dr. Grisso's research, Dr. Zaremba concurred with Grisso's findings on race and intelligence, as measured by IQ testing, and further found the presence of a learning disability constituted another negative factor in the comprehension of Miranda rights. Notable is Zaremba's finding that age of the student is not as significant in improving the understanding of one's constitutional rights as Grisso had posited. She found that non-learning disabled high school students performed below the acceptable level of comprehension determined by Grisso for a valid waiver of rights. The teenagers had special problems in understanding the role and time for intervention by a lawyer if asserting their right to an attorney. Many equated an attorney with a social worker, and some believed that their invocation of the right to counsel would entitle them to a lawyer "when I go to court." Id. at 87. Dr. Zaremba concluded that **"no juvenile, ...** should be allowed to waive [their rights] without an attorney present." *Id.* at 96 (emphasis in original).

Thus, the results of several empirical studies on the capacity of juveniles to understand and intelligently assert their self-incrimination rights as articulated in *Miranda*, lead

inevitably to the conclusion that juveniles must be extended far greater protections than those customarily accorded to adults in interrogation settings. Juveniles are deemed to lack the legal capacity to make wills, enter into contracts enforceable against them, marry without parental permission, or engage in any number of important activities. And yet a juvenile is presumed capable of waiving important constitutional rights during a police interrogation which exposed a sixteen-year-old youth to the awful possibility of execution in Virginia's electric chair.

I. THE MIRANDA ISSUE

The Virginia Court of Appeals erred in finding that Novak was not in custody prior to that point in time at which he made an initial admission of guilt. Novak v. Commonwealth, 20 Va. App. 373, 386, 457 S.E.2d 402 (1995)(hereinafter referred to as Novak, with references to the appropriate page in the appendix). In Miranda v. Arizona, 384 U.S. 486 (1966), this Honorable Court held that statements made by an accused during custodial interrogation, without being advised of his constitutional rights, are not admissible into evidence. The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any way." Miranda, 384 U.S. at 444. All the circumstances surrounding the interrogation must be examined to determine whether the suspect's freedom of action is curtailed to a "degree associated with formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983)(*per curiam)*. The appropriate inquiry is "how a reasonable man in the suspect's position would have understood his position," Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

An examination of all the circumstances surrounding this confession quickly reveals that no reasonable sixteen year old in Shawn Novak's position would have believed that he was free to leave. In United States v. Griffin, 922 F.2d 1343 (8th Cir. 1990), the Eighth Circuit Court of Appeals engaged in a very thorough analysis of the factors relevant to a determination of custody and the weight which should be accorded each. The Griffin court found that the typical inquiry will examine the "accused's freedom to leave the scene and the purpose, place and length of the interrogation." Griffin, 922 F.2d at 1348 (citations omitted). More critical to the determination of whether an interrogation is custodial are the following:

> (1.) Whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2.) Whether the suspect possessed unrestrained freedom of movement during questioning; (3.) Whether the suspect initiated contact with the authorities or voluntarily acquiesced to official requests to respond to questions; (4.) Whether strong arm tactics or **deceptive stratagems** were employed during questioning; (5.) Whether the atmosphere of the questioning was police dominated; or, (6.) Whether the suspect was placed under arrest at the termination of questioning.

Id.(emphasis added).

The Griffen pointed out that this list is not an exhaustive one, but is representative of the most frequently encountered indicia of arrest. The Griffen court characterized the first three factors as being "mitigating factors," and their presence would tend to vitiate a finding of custody. The final

factors were characterized as "coercive factors," and their presence would tend to support a finding of custody. As the Griffen court noted, the presence of all is not necessary to a determination of custody; a "particularly strong showing of one factor may compensate for a deficiency with respect to the other factors." Id. citing South Dakota v. Long, 465 F.2d 65, 70 (Th Cir. 1972), *Cert. denied.* 409 U.S. 1130 (1973).

The application of these factors to the instant case is instructive in reaching the conclusions that the final interrogation of Shawn Novak became custodial long before any Miranda warnings were read to him. No reasonable juvenile in Shawn's position would have understood that he was free to leave. "By virtue of his youthful age and lack of experience with the police, Shawn had no basis upon which to conclude that he had not been deprived of his freedom of action." Novak, (dissenting opinion, A28).

"Compulsion is inherent in custodial settings," Miranda, 384 U.S. at 458. At the insistence of the police, Shawn was interrogated at the police station, in an interrogation room for a total of more than six and one half hours. Prior to the station interrogations, Shawn was interrogated in a police car.

Although Hoffman denied that Shawn was a suspect prior to the final interview, he did concede that he was "suspicious" of Shawn prior to that time. As Judge Benton noted in his dissent Hoffman's assertion that Shawn was not a suspect is strongly belied by the record. Novak, A28. He had interviewed numerous people regarding Shawn's conduct, movements and statements. Shawn had given contradictory statements to these individuals.

The first three mitigating factors cited by the Griffen court were remarkably absent in the circumstances

surrounding Shawn's interrogation. The first factor is whether the suspect was told he was not under arrest or free to terminate questioning. Here, although Shawn and his mother were told that Shawn was not "under arrest,"no reasonable person in their circumstances would have understood this to mean that Shawn was free to terminate questioning at any time, and leave the station. Mrs. Novak testified that she had repeatedly attempted to resist requests to interrogate Shawn at the station, all to no avail. Each visit to the station was prompted by the insistence of the police.

The second factor is whether the suspect possessed unrestrained freedom of movement during questioning. Although the Commonwealth, both at trial and in its brief, emphasized the fact that Shawn was free to the leave the interrogation room and obtain refreshments, he only did so when Hoffman called a break. Furthermore, Hoffman dominated Shawn during at least one break; he told Shawn twice to "say hi to mom" so she would not worry. Hoffman thereby prevented any request by mom to re-enter the interrogation room.

The final mitigating factor is whether the suspect initiated contact with the police or "voluntarily acquiesced to official requests to respond to questions." Mrs. Novak testified that the police were very persistent and it was at their insistence that Shawn was interrogated at the station three times. She resisted the questioning of Shawn on several occasions. But they ignored her stated wishes. There is no evidence on this record from which to conclude that Shawn "voluntarily acquiesced to respond to questions."

In contrast to the absence of mitigating factors is the presence of the coercive factors cited by the Griffen court.

The first of these is whether strong arm tactics or deceptive stratagems were employed during questioning. The record clearly shows that Hoffman employed "deceptive stratagems." He did so to persuade mom to leave the room. He told mom Shawn was not a suspect and that he would ask no questions. Immediately after she left however, he began to ask Shawn about the murdered boys. He lied to Shawn Hoffman assured Shawn that Shawn was not a suspect and repeatedly told Shawn that he "[was] not trying to trick him." As Judge Benton noted, Hoffman "lied to Novak at least four times during the course of the interview." This included telling Shawn that his fingerprints had been discovered on the body through the use of new laser finger printing technology. He also told Shawn that witnesses had seen him with the boys on Monday.

The next factor is whether the atmosphere of questioning was police dominated. The final interrogation took place at the police station in a small closed room, without windows. It followed two other interrogations at the same place, each lasting two hours and each occurring while Shawn was separated from his mother.

As soon as Mrs. Novak left the interrogation room, both the tenor and the substance of the questioning changed. Prior to Mrs. Novak's departure, Hoffman had been seated adjacent to Shawn and had to turn his head to look at Shawn. Physically Hoffman dominated Shawn by using his size and his close physical proximity. As soon as Mrs. Novak left, Hoffman moved closer to Shawn, positioning himself directly in front of Shawn, and between Shawn and the door. Hoffman, a fairly burly man, firearm at his side, loomed over Shawn, often gesticulating his hands closely to Shawn's face.

Psychologically he dominated Shawn by using false assurances and lies. Immediately after mom's departure Hoffman began asking Shawn about the murdered boys although he had assured Mrs. Novak, in Shawn's presence, that he would not. Hoffman repeatedly assured Shawn that he was not trying to trick him. He told Shawn that Shawn was not a suspect. Aggressive and strident tones were followed by calm and soothing ones which were finally employed to lull Shawn into a confession.

Finally, the strongest showing is Hoffman's complete dominance during the questioning. First, as earlier stated, he overbore Mrs. Novak's will and by extension, Shawn's. He persuaded Mrs. Novak to leave the room notwithstanding her great reluctance to do so... The application of the Griffen analysis clearly demonstrates that the questioning of Shawn Novak was custodial long before he was advised of his constitutional rights.

Hoffman also dominated the interrogation by excluding Mrs. Novak. This Court condemned this police strategy police strategy in Miranda, 384 U.S. at 449-450, 455, noting its very coercive effect. Certainly in this case, the deliberate exclusion of Mrs. Novak was by far and away the most egregious of all the events leading up to and surrounding the final interrogation of Shawn. In Griffen, the court commented on the agents' exclusion of the suspect' parents from the dining room in which they held him. The court stated:

> By sending Griffin's parents away, the agents asserted their dominion over the interrogation site, isolating Griffen from family who may have provided moral support, and eliminated any last vestige of a public interrogation. Any objective reasonable person would

> conclude from these actions that the authorities were now in complete control of the defendant. Indeed, the agents did create an atmosphere which cause Griffen to be fearful.

Griffen, 922 F.2d at 1355.

Hoffman did precisely the same thing in this case. He excluded Mrs. Novak, against her will. Hoffman requested Mrs. Novak to leave that room and she did so with the most extreme reluctance. No reasonable juvenile witnessing an encounter similar to that between Hoffman and Mrs. Novak would conclude that he was free to terminate questioning or leave the interrogation. Having coerced the confession, Hoffman read the sobbing boy his rights. He then continued the interrogation for approximately another sixteen minutes. Shawn had asked that his mother be told, a request that was presumably ignored. Hoffman then arrested Shawn.

As the Griffen court noted, the deliberate separation of a suspect from his friends or family almost inevitably leads to the conclusion that the suspect was, in fact, in custody. "It is an established interrogation practice. ..." Griffen, 922 F.2d at 1352, citing Miranda, 384 U.S. at 451. As stated, the Griffen court found it very significant that the police isolated the suspect by taking him into his dining room "for privacy," and "sending his parents away." It held that under these circumstances, the suspect wast in custody and therefore should have been read his Miranda rights. The statement was suppressed. Griffen, 922 F.2d at 1356-57.

Other federal courts addressing the issue have found isolation from friends and family to be significant in viewing the totality of circumstances. The fact of such isolation almost inevitably leads to a finding that the questioning was custodial

and the suspect should have been advised of his constitutional rights. See generally, cases cited in Griffen, 922 F.2d at 1350-1353. See also, United States v. Griffen, 7 F.3d 1512 (10th Cir.1993)(suspect in custody when separated from friend prior to questioning by police in small airport office); United States v. Carter, 884 F.2d 368 (8th Cir. 1989)(Custodial interrogation where bank employee questioned in the president's office away from the supportive environment of co workers); United States v. Beraun-Penz, 812 F.2d 578 (9th Circ. 1987)(warnings required prior to questioning where police dominated interrogation scene by sending suspect's co worker away); United States v. DiGiacomo, 579 F.2d 1211 (10th Cir. 1978)(warning required where suspect separated from her four companions).

All of the foregoing authority mandates the conclusion that Shawn Novak's interrogation was custodial, if not in its entirety, then at the moment his mother left the room. Because he was not advised of his constitutional rights at that time, all statements given during that final interrogation and the evidence derived therefrom should have been suppressed. As this Court stated in Escobedo v. Illinois, 378 U.S. 478, 490 (1964):

> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. ... If the exercise of constitutional rights will thwart the effectiveness or law enforcement, then there is something very wrong with that system.

II. THE INVOLUNTARINESS ISSUE

Just as the circumstances leading up to and surrounding Novak's confession mandate the conclusion that he was in custody, so do they mandate the conclusion that his confession was not voluntary. The totality of circumstances must be examined to determine whether "the confession [was] the product of an essentially free and unconstrained choice by its maker. ... [And if the maker's] will has been overborne and his capacity for self determination critically impaired, the use of his confession offends due process." Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973), citing Columbe v. Connecticut, 367 U.S. 568, 602 (1961).

"Special care must be used in "scrutinizing the record [of a juvenile's confession.]" Haley v. Ohio, 332 U.S. 596, 599 (1947). Application of the test of the totality of the circumstances "mandates inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." Fare v. Michael C., 442 U.S. 707, 725 (1979).

Again, it is abundantly clear on this record that Shawn Novak's will was overborne. Shawn, a juvenile who had just turned 16, had no prior experience with the police. He had never previously been interrogated and thus, had never before been confronted with issue of understanding or exercising his rights. The record establishes that Shawn was an extremely obedient boy, always deferential to authority. Further, the police had information which strongly indicated Shawn's mental disturbance. They knew, for example, that on one

occasion, Shawn was found standing in a trash can, alone in a darkened classroom. They were also aware that Shawn had been frequently seen talking to inanimate objects and had worn a necklace with a dead birds head on the end. Indeed, intensive psychological testing revealed Shawn to be a very disturbed child and the judge so found on the day of his sentencing.

These factors were compounded by the very coercive circumstances surrounding his interrogation which were more fully examined in the preceding section. However, it cannot be emphasized strongly enough that the deliberate exclusion of Shawn's mother from the interrogation room was by far the most coercive factor. She repeatedly requested to be present during the questioning and those requests repeatedly went unheeded. The detective told her, in Shawn's presence, that there would be no questions relating to the dead boys. But, as soon as she left he began questioning Shawn about the dead boys. Having finally, after 2 hours of questioning, which was preceded by two other two hour sessions, obtained an admission from Shawn regarding his involvement, Hoffman, for the first time read Shawn his constitutional rights. At that point in time Shawn was sobbing and held his head in his hands. There can be no doubt that his distress precluded a full understanding of those rights.

A purview of this Honorable Court's precedent underscores the egregiousness of this circumstance. This Court has stated that the confessions of juveniles requires "special caution." In re Gault, 387 U.S. 1, 45, (1967). See also, Gallegos v. Colorado 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1947). In each of those cases the confession of the juvenile was held involuntary. Further, in each of those cases this Court stressed the fact that the juveniles in question had no parent or adult friend to guide them during the course of the interrogation. In Gallegos, the

Court stated:

> But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Gallegos, 370 U.S. at 53.

III. THE CURRENT LEGAL LANDSCAPE REGARDING JUVENILE CONFESSIONS

Aware of the vulnerability of juveniles interrogated by the police, many states have, either judicially or legislatively, adopted rules which afford special safeguards for the waiver of a juvenile's constitutional rights. Some require that the parents also be advised of and understand the rights which the juvenile is waiving. See, State v. Jiminez, 799 P.2d 785 (Ariz. 1990). Others require that the juvenile be afforded the "opportunity to confer with an interested adult" prior to waiving constitutional rights. Commonwealth v. Berry, 570 N.E.2d 1004, 1007 (Mass. 1991). Almost all the states, including Virginia, agree that the absence of a parent from custodial interrogation "weigh[s] against the admissibility of that statement." Miller v. Maryland, 577 F.2d 1158, 1159 (4th Cir. 1978). However, to the best of Petitioner's knowledge, Virginia stands apart from her sister states; Virginia is the only state holding a juvenile confession both noncustodial and voluntary when it is borne of an interrogation from which the parent was deliberately excluded, against the parent's will, and without the knowing and

intelligent waiver of her presence by the child.

See *e.g.* People v. Montanez, 652 N.E.2d 1271 (Ill.App. 1 Dist. 1995), *Cert.. denied,* ____ *U.S.* ___ (1996). the Illinois Court strongly condemned the deliberate exclusion of the suspect's mother from the custodial interrogation. The suspect's mother, Mrs. Lorenzi, testified that the police came to her home and informed she and her husband that their daughter was in protective custody because she had been a witness to a murder. Mrs. Lorenzi asked to see her daughter and was told she could not because her daughter was in protective custody and they told her they would advise her when she could see her daughter. Four hours later, not having heard from the police, Mrs. Lorenzi went to the station. She arrived at approximately 2:00 a.m. She was told to wait and did so for an hour and a half. She then went upstairs where the detective told her to "get the hell out" because they were talking to her daughter. Finally, at about 8:00 a.m. Mrs. Lorenzi was allowed to see her daughter who appeared to be under the influence of intoxicants.

The State's evidence showed that the defendant's statement was taken at 5:15 a.m. the defendant was advised of her rights and she stated that she had been treated well and had no complaints. The deliberate exclusion of the suspect's parent weighed very heavily in the Montanez court's analysis of the totality of the circumstances. The court also cited number of other Illinois cases where similar facts where a parent was deliberately excluded mandated a finding that the statement was not voluntary. The court did, however, stop short of holding that such a circumstance is a *per se* violation of the juvenile's constitutional rights.

In People v. Jordan, 386 N.W.2d 594, 599 (Mich. App. 1986), the court found that the confession of the juvenile was involuntary when the police refused to allow the suspect's mother and sisters to accompany the juvenile to the station.

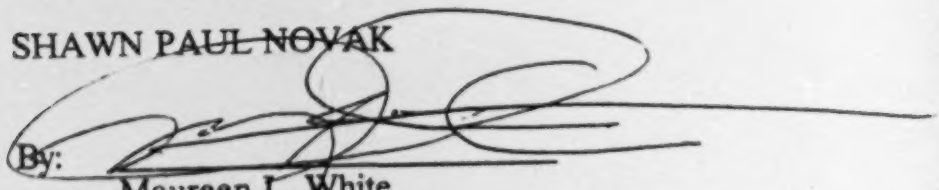
There was also some evidence presented that the police threatened the juvenile. The New York courts have similarly condemned such sharp practices by the police. In People v. Townsend, 300 N.E.2d 722 (N.Y 1972) the mother of a 17-year-old boy repeatedly called the police about her son. They denied that the boy was in custody. Not only was the boy in custody at the time, but confessing to a crime. See also, People v. Bevilacqua, 382 N.E..2d 1326 (N.Y. 1978) (statement suppressed when given after 18-year-old suspect asked to see mother and suspect's lawyer requested the cessation of all interrogation and concealed suspect's whereabouts from his lawyer).

CONCLUSION

For all the foregoing reasons the writ should be granted

Respectfully Submitted,

SHAWN PAUL NOVAK

By: 

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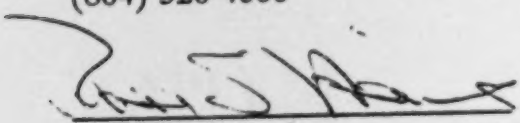

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VIRGINIA: IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON WEDNESDAY THE 10TH DAY OF JANUARY, 1996.

Shawn Paul Novak,
Appellant,

against Record No. 951404
Court of Appeals No. 1416-92-1

Commonwealth of Virginia,
Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Virginia Beach shall allow court-appointed counsel the total fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Justice Koontz took no part in the consideration of this case.

A Copy,
Teste:
David B. Beach, Clerk
By: (s)_____
Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorneys' fee $200.00 plus costs and expenses
Teste:
David B. Beach, Clerk
By: Deputy Clerk

SHAWN PAUL NOVAK

vs

COMMONWEALTH OF VIRGINIA

Record No. 1416-92-1
COURT OF APPEALS OF VIRGINIA
457 S.E.2d 402, 20 Va. App. 373
May 23, 1995, Decided

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH. John K. Moore, Judge.

COUNSEL

Richard G. Brydges; Stephen C. Mahan (Brydges, Brydges and Mahan, on briefs), for appellant.

Richard B. Smith, Assistant Attorney General (James S. Gilmore, III, Attorney General, on brief), for appellee.

Amicus Curiae: Youth Advocacy Clinic and Mental Disabilities Clinic, University of Richmond Law School (Robert E. Shepherd, Jr.; Kathe Klare; Robin Hegner, on brief), for appellant.

JUDGES

Present: Judges Benton, Willis and Bray. BENTON, J., dissenting.

AUTHOR: BRAY

OPINION

{*379} OPINION

Shawn Paul Novak (defendant), a juvenile, age sixteen, was convicted by a jury on an indictment charging capital murder. On appeal, defendant complains

that he was improperly transferred from the Juvenile and Domestic Relations District Court (J&D court) to the trial court for prosecution as an adult, and that the trial court failed to conduct a de novo review of such transfer. Defendant further contends that the trial court erroneously (1) declined to suppress his confession and certain psychiatric evidence, (2) refused to order the Commonwealth to "open" its "files" to his inspection, (3) overruled his motion for additional pretrial psychiatric evaluation, (4) permitted cameras in the courtroom, (5) denied a continuance to permit his investigation of exculpatory evidence first disclosed during trial, and (6) overruled his motion for a mistrial. Defendant also challenges the sufficiency of the evidence to support the conviction. Finding no error, we affirm the judgment of the trial court.

Under familiar principles of appellate review, we examine the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. **Traverso v. Commonwealth**, 6 Va. App. 172, 176, 366 S.E.2d 719, 721 (1988).

On the evening of March 4, 1991, Christopher Weaver, age seven, and Daniel Geier, age nine, did not return to their respective homes from play. Earlier that day, both children had briefly visited with a neighbor, Benet Stead, and were last seen by him at "about quarter after five to 5:30," in the company of defendant, at the edge of nearby "woods." The following morning, a "search party" combed this wooded area, and the children's bodies were discovered by James McKinsey {*380} hidden beneath "stacks of pine tree limbs." According to the medical examiner, Weaver died from "three stab wounds which would have been a quick three thrusts resulting in incapacitation and ... repeated cutting and slashing of the neck until it was almost decapitated .... " Geier had been killed by a

"blunt force injury" and "multiple slashes" on his neck.

Although McKinsey did not recall seeing defendant during the search, shortly after the discovery defendant claimed to a friend, Donald Williams, that he had personally located the bodies. The following day, March 6, 1991, defendant related a similar story to schoolmates and others. Later that same day, defendant commented to Williams's mother that he had seen the children at approximately 5:00 p.m. on the afternoon of their disappearance. She immediately telephoned a police "hotline" in defendant's presence, and he then spoke to a "gentleman on the phone," willingly providing his name and address.

During the ensuing investigation, defendant, accompanied by his mother, was interviewed by detectives at police headquarters on three separate occasions. At the final meeting between Detective Hoffman and defendant, Hoffman told defendant that a police officer had observed conduct by defendant at the crime scene inconsistent with his earlier statements, and that police had obtained defendant's fingerprints from the clothing of a victim, all of which was untrue. Nevertheless, Hoffman testified that he did not regard defendant as a "suspect until [he] asked, 'Did you kill them?'" and defendant answered, "yes." This response prompted Hoffman to immediately advise defendant of his **Miranda** rights, followed by defendant's execution of a related waiver and detailed confession to the crimes.

During a subsequent search of defendant's residence, police discovered a knife, a book entitled "Serial Killers," and several newspaper clippings of articles related to other violent crimes in the region, all from defendant's bedroom. Experts testified that the knife, or "another object having exactly the same {*381}

features," had impressed a blood stain on the trousers of one victim and was the "tool" used to cut tree limbs that had covered the bodies.

Prosecution of defendant was commenced in the Virginia Beach J&D court. However, following an **ore tenus** hearing pursuant to Code 16.1-269, n1 jurisdiction was transferred to the trial court for treatment of defendant as an adult. In ordering transfer, the J&D court expressly "found probable cause to believe that [defendant] had committed" the offenses and noted that all "the statutory requirements for transfer had been met." See Code 16.1-269(A), (C). Due to the "gravity of the charges," the J&D court did not consider defendant "amenable to treatment or rehabilitation as a juvenile." See Code 16.1-269(A)(3)(b).

Defendant appealed the transfer decision to the trial court, challenging the failure of the J&D court to properly consider his "amenability ... to treatment within the juvenile court." He argued that the trial court, while it need not review probable cause, must "make its own determination" of the several statutory factors requisite to transfer. See Code 16.1-269. However, "after having examined all such papers, reports and orders pertaining hereto" and "carefully listening to arguments of counsel," the trial court concluded that the J&D court had "complied with [Code] 16.1-269," and permitted the Commonwealth to "seek an indictment against the defendant."

Incidental to the proceedings both in the J&D court and trial courts, defendant was the subject of several psychiatric examinations. Dr. Robert Showalter testified in behalf of defendant that he exhibited a "schizotypal personality disorder." Drs. Lee Mingione and Paul

Mansheim, Commonwealth witnesses, disagreed and opined that defendant knew right from wrong when he murdered the victims. Dr. Mingione further noted that defendant was "very bright," "interactive," {*382} and "evinced no unusual personality traits for a sixteen-year-old."

I. Transfer Hearing

Defendant first contends that his transfer from the J&D court to the circuit court for trial as an adult was unconstitutional because the attendant proceedings lacked the "individualized and particularized" consideration mandated by the Eighth Amendment in death penalty cases. **See Stanford v. Kentucky**, 492 U.S. 361, 375-76, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989). However, because defendant was not sentenced to death, we find this argument moot. See **Lewis v. Commonwealth**, 218 Va. 31, 38, 235 S.E.2d 320, 325 (1977) (When "life term was substituted ... for a ... sentence of death, the conclusion is inescapable that the question of the constitutionality of [the procedures leading to] the death penalty has been rendered moot."); **see also Bumper v. North Carolina**, 391 U.S. 543, 545, 20 L. Ed. 2d 797, 88 S. Ct. 1788 (1968) (complaint that jury was unconstitutionally "death qualified" rendered moot when defendant received life sentence).

Defendant further argues that the Virginia juvenile transfer statute unconstitutionally permits a juvenile, age fifteen or older and charged with armed robbery, rape, or murder, to be "certified" to the circuit court for trial as an adult without a preliminary finding that the accused is unamenable to treatment as a juvenile. n2 Defendant contends that such "automatic certification" denies both equal protection and due process. We

disagree.

In **Hutcherson v. Commonwealth**, 7 Va. App. 534, 536-37, 375 S.E.2d 403, 404 (1989), this Court approved a "finding of [*383] nonamenability based solely on the nature of the offense," provided the related inquiry included consideration of "circumstances surrounding the offense," the "extent of the juvenile's involvement[,] and the interests of society and of the child." We also expressly recognized that a "determination of nonamenability based **solely** on the face of the charge is ... permissible when the offense is one of those enumerated in the statute [i.e., armed robbery, rape, and murder]." **Id.** at 537, 375 S.E.2d at 404 (emphasis added). Contrary to defendant's argument, this provision does not result in "automatic certification." The statute simply dispenses with the finding that the juvenile is unamenable "to treatment or rehabilitation" as a prerequisite to transfer in such instances. Code 16.1-269(A)(3)(b). The remaining "conditions" of Code 16.1-269(A) must be satisfied before "any such transfer" is ordered. Code 16.1-269(A).

The legislature had a rational basis for treating a juvenile charged with murder, rape, or armed robbery differently from one prosecuted for a less violent offense. **Hutcherson**, 7 Va. App. at 537, 375 S.E.2d at 404; see **Ballard v. Commonwealth**, 228 Va. 213, 217, 321 S.E.2d 284, 286 (1984), cert. denied, 470 U.S. 1085, 85 L. Ed. 2d 146, 105 S. Ct. 1848 (1985). Code 16.1-269(A)(3)(b)identifies certain violent crimes against the person as acts inconsistent with the conduct of an offender amenable to treatment as a juvenile, a distinction both logical and constitutional. The resulting "classification" is, therefore, reasonably related to a "legitimate" governmental objective, **New Orleans v. Dukes**, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976), juvenile rehabilitation consonant with

protection of the public. **Hutcherson**, 7 Va. App. at 536-37, 375 S.E.2d at 404; see Code 16.1-227. "Courts will not overturn a statutory classification on equal protection grounds unless it is so unrelated to the achievement of a legitimate purpose that it appears irrational." Ballard, 228 Va. at 217, 321 S.E.2d at 286; **see Commonwealth v. Ramey**, 19 Va. App. 300, 302, 450 S.E.2d 775, 776 (1994). [*384]

II. Appeal of Defendant's Transfer

Defendant appealed the J&D transfer decision to the trial court pursuant to Code 16.1-269(E). In subsequent correspondence to counsel, the trial judge noted that, although defendant was entitled to a "hearing" on the transfer issue, a "de novo review was not appropriate." Despite defendant's contention that the court erred, **Russell v. Commonwealth**, 16 Va. App. 660, 432 S.E.2d 12 (1993), instructs that **de novo** review by the circuit court is unnecessary, provided "there [is] a hearing that gives **meaningful review**." Id. at 665, 432 S.E.2d at 16 (emphasis added). The record discloses that the trial court examined "all of the papers connected with this case," including the transcript, transfer report, and the J&D transfer order, and "carefully listened to the arguments of counsel," before ruling that the "requirements of [Code] 16.1'269 were . . . complied with ....,, Such consideration clearly constituted the "meaningful review" of the transfer decision contemplated by Code 16.1-269 and Russell.

Defendant asserts for the first time on appeal that the trial judge improperly placed the burden upon him to prove noncompliance with Code 16.1-269. It is well established that this Court will not consider an argument on appeal which was not presented to the trial court.

Jacques v. Commonwealth, 12 Va. App. 591, 593, 405 S.E.2d 630, 631 (1991); Rule 5A:18. We, therefore, decline to address this issue.

III. Admissibility of Confession

Defendant contends that the trial court erroneously overruled a motion to suppress his confession, portions of which preceded **Miranda** warnings. See **Miranda v. Arizona**, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). However,

> the Supreme Court has made it clear that the prescribed warnings must be given before statements are taken from suspects only where there is custodial interrogation as thus defined in **Miranda**: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a [*385] person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

Coleman v. Commonwealth, 226 Va. 31, 46, 307 S.E.2d 864, 872 (1983), **cert. denied**, 465 U.S. 1109, 80 L. Ed. 2d 145, 104 S. Ct. 1617 (1984) (quoting **Miranda**, 384 U.S. at 444 (footnote omitted)); see **Wass v. Commonwealth**, 5 Va. App. 27, 30, 359 S.E.2d 836, 837 (1987). "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" **Stansbury v. California**, 128 L. Ed. 2d 293, U.S. , , 114 S. Ct. 1526, 1528-29 (1994) (quoting **California v. Beheler**, 463 U.S. 1121, 1125, 77 L. Ed. 2d 1275, 103 S. Ct. 3517 (1983) (per curiato))

(citation omitted); **see Burket v. Commonwealth**, 248 Va. 596,604, 450 S.E.2d 124, 129 (1994); **Commonwealth v. Milner**, 13 Va. App. 556, 558, 413 S.E.2d 352, 353 (1992).

In this analysis, "the situation must be viewed from the vantage point of 'how a reasonable man in the suspect's position would have understood his situation.'" n__3 Wass, 5 Va. App. at 32, 359 S.E.2d at 839 (quoting **Berkemer v. McCarty**, 468 U.S. 420, 442, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984)). On review, we must consider the evidence in the light most favorable to the prevailing party below, the Commonwealth in this instance, id. at 30, 359 S.E.2d at 837, and the trial court's findings will not be disturbed unless unsupported by the record. See **Lanier v. Commonwealth**, 10 Va. App. 541, 555, 394 S.E.2d 495, 504 (1990). Here, defendant, accompanied by his mother, had twice voluntarily come to police headquarters for interviews. During [*386] a third visit, under like circumstances, defendant confessed to the offenses. He had been previously advised that he was neither under arrest nor a suspect, and Detective Hoffman only wanted to ascertain "anything or anyone that [defendant] may have seen in the area."

The interview was conducted in a carpeted room, "approximately ten-by-twelve," furnished with a table and several chairs. A "one-way mirror" permitted visual access from an adjoining room. Although defendant's mother was present at the inception of the interview, Hoffman persuaded her to leave the room, insisting that defendant could then more comfortably discuss "his friend's whereabouts" and "habits." Defendant was aware, however, that she remained nearby, still in the building. Until the confession, defendant was permitted

to move about the building and "was free to leave at anytime."

This evidence, considered with the entire record, including a video tape of the interview in issue, provided abundant support for the trial court's determination that defendant was not "in custody" at the time of his initial admission of guilt and prior **Miranda** warnings were, thus, unnecessary. However, defendant reminds us that any confession, "even if obtained in full compliance with **Miranda**, may be inadmissible if . . not voluntary." **Kauffmann**, 8 Va. App. at 405, 382 S.E.2d at 281. It is well established that the "Commonwealth bears the burden of proving by a preponderance of the evidence" that the accused knowingly, intelligently, and voluntarily waived his **Miranda** rights. **Mills v. Commonwealth**, 14 Va. App. 459, 468, 418 S.E.2d 718, 722-23 (1992); **Wilson v. Commonwealth**, 13 Va. App. 549, 554, 413 S.E.2d 655, 658 (1992).

In assessing the voluntariness of a confession on appeal, "we must [independently] determine whether, in light of the totality of the circumstances, including not only the details of the interrogation, but also the characteristics of the accused, the statement was the product of an essentially free and unconstrained choice by its maker, or whether the maker's [*387] will was overcome and his capacity for self-determination critically impaired." **Goodwin v. Commonwealth**, 3 Va. App. 249, 253, 349 S.E.2d 161, 163-64 (1986); **Gray v. Commonwealth**, 233 Va. 313, 324, 356 S.E.2d 157, 163, **cert. denied**, 484 U.S. 873, 98 L. Ed. 2d 158, 108 S. Ct. 207 (1987); **Mills**, 14 Va. App. at 468, 418 S.E.2d at 723. In our review of this issue, we again consider "the evidence in the light most favorable to the prevailing party" below, the

Commonwealth in this instance, Mills, 14 Va. App. at 468, 418 S.E.2d at 723, and "are bound by the trial court's subsidiary factual findings unless those findings are plainly wrong." **Wilson v. Commonwealth**, 13 Va. App. 549, 551, 413 S.E.2d 655, 656 (1992).

Here, the trial judge found defendant "highly intelligent" and "articulate in his answers to the questions." He noted from the video tape of the interview that defendant was "smoking cigarettes," taking refreshment, "smiling," and "obviously in complete control of himself," "with a full understanding of the interview process and what was being said and why he was there." From this evidence and the other circumstances attending the interview, the court concluded that defendant "made a knowing and intelligent waiver of [**Miranda**] rights," "signed the written waiver form," and "acknowledged that he wished to make a statement." This finding is well supported by the record. Although defendant argues that his mother's presence in the interview room was an indispensable ingredient to voluntariness, "it is well established that the mere absence of a parent ... does not render a [juvenile's] waiver invalid." **Grogg v. Commonwealth**, 6 Va. App. 598, 613, 371 S.E.2d 549, 55V

Defendant's contention that Hoffman's use of deception tainted the confession is also without merit. See **Hutto v. Ross**, 429 U.S. 28, 30, 50 L. Ed. 2d 194, 97 S. Ct. 202 (1976). While "[a] deliberate falsehood by a police officer in the course of his duties may undermine the respect that significant segments of the public may have for law enforcement and the system of justice[,]" **Wilson v. Commonwealth**, 13 Va. App. at [*388] 554, 413 S.E.2d at 658, "'a lie on the part of an interrogating

police officer does not, in and of itself, require a finding that a resulting confession was involuntary."' Id. at 555, 413 S.E.2d at 658 (quoting **Rodgers v. Commonwealth**, 227 Va. 605, 616, 318 S.E.2d 298, 304 (1984)). Nothing in this record suggests that deception by Hoffman compelled defendant's waiver or confession, against his will and without choice.

Thus, our independent review of the record discloses that defendant's waiver and related confession were voluntary and properly admitted into evidence by the trial court.

IV. Suppression of Dr. Mansheim's Report and Testimony

In response to the Commonwealth's representation that "the appointment of a psychiatrist [was] necessary for preparation of [its] case in meeting the defendant's insanity plea," the trial court appointed Dr. Paul Mansheim "to assist the Commonwealth and determine (1) the defendant's mental state or condition at the time of the alleged offense, and (2) the defendant's capacity to appreciate the criminality of his conduct at the time of the offense." Thereafter, Mansheim conducted an examination of defendant in accordance with the order and prepared an attendant report.

During a subsequent hearing, it was disclosed that the Commonwealth was deliberately withholding this report pending receipt of a report from defendant's psychiatrist, Dr. Showalter, then months overdue. Defendant thereafter requested the court to compel production of the Mansheim report pursuant to Code 19.2-168.1. Defendant also asserted that the "conduct of the Commonwealth and Mansheim, acting in concert," raised "serious doubt upon the neutrality of

Mansheim" and requested the court to suppress the related evidence and "open" the Commonwealth's "case files" to defendant's inspection. The trial court ordered that the Mansheim report be made available to defendant and Showalter's report be prepared and shared with the Commonwealth, but otherwise overruled defendant's motion. {*389} "The remedial relief to be granted by the trial court following a discovery violation or upon the late disclosure of evidence is within the trial court's discretion and will not be disturbed on appeal unless plainly wrong." **Moreno v. Commonwealth**, 10 Va. App. 408,.420, 392 S.E.2d 836, 844 (1990); see also **Frye v. Commonwealth**, 231 Va. 370, 383, 345 S.E.2d 267, 277 (1986) ("The relief to be granted upon a violation of Rule 3A:11 is within the discretion of the trial court ."). "Late disclosure does not take on constitutional proportions unless an accused is prejudiced by the discovery violations depriving him of a fair trial." Moreno, 10 Va. App. at 417, 392 S.E.2d at 842; see **Davis v. Commonwealth**, 230 Va. 201, 204-05, 335 S.E.2d 375, 377-78 (1985). Here, defendant received the Mansheim report a full two weeks before trial, and there is no evidence of prejudice resulting from the delayed disclosure. Accordingly, we find no error in the ruling of the trial court.

V. Request for Additional Psychiatric Evaluation

On February 19, 1992, defendant requested transport to Rockingham Memorial Hospital in Harrisonburg for eight days to permit additional "one on one" examinations by Showalter. The court denied the motion, noting that trial was scheduled for March 2, 1992, and that Showalter, "involved since [the preceding] June," should conduct the interview locally to insure defendant's availability for any necessary pretrial "prOceedings."

While defendant challenges this ruling, he offers nothing to establish any attendant prejudice. The issue was clearly a matter resting within the sound discretion of the trial court, and we cannot say that the court. abused such discretion in this instance. See **Cardwell v. Commonwealth**, 248 Va. 501, 508-09, 450 S.E.2d 146, 151 (1994).

We need not address defendant's related, but unsupported, assertion that, by denying access to a psychiatrist, the trial court "effectively denied [defendanti.due process, equal protection, the right to call evidence on his behalf[,] and the effective assistance of counsel." "Statements unsupported by {*390} argument, authority, or citations to the record do not merit appellate consideration." **Buchanan v. Buchanan**, 14 Va. App. 53, 56, 415 S.E.2d 237, 239 (1992).

VI. Cameras in the Courtroom

Several days prior to trial, the court informed counsel that a request for media coverage of the trial had been granted, and that a camera would be located in the "back of the courtroom." n4 Defendant conceded that "the ultimate decision on that is up to the court" but "opposed the coverage," arguing that "certification as an adult [did not] necessarily remove[] it from the juvenile realm." The court recognized that Code 19.2-266 prohibited cameras in "juvenile proceedings," but concluded that a juvenile transferred for trial as an adult was not embraced by the exclusion and permitted the coverage. Defendant complains that this ruling denied him protection of the statute, due process, and equal protection. Code 16.1-269(F) provides that "after the case has been transferred or removed and the grand jury returns a

true bill upon such indictment the jurisdiction of the juvenile court as to such case shall terminate." **Id.** Thus, once a juvenile is transferred to the circuit court pursuant to Code 16.1-269, he is thereafter prosecuted as an adult. In such circumstances, a decision to permit cameras in the courtroom rests with the sound discretion of the trial court, Code 19.2-266, and "absent a showing of prejudice of constitutional dimensions," **Chandler v. Florida,** 449 U.S. 560, 582, 66 L. Ed. 2d 740, 101 S. Ct. 802 (1981), the mere presence of cameras does not result in an unfair trial. **See Savino v. Commonwealth,** 239 Va. 534, 547 n.4, 391 S.E.2d 276, 283 (1990); **Fisher v. Commonwealth,** 236 Va. 403, 410 n.2, 374 S.E.2d 46, 50 (1988). Defendant failed to demonstrate "good cause" to exclude the {*391} cameras and offered no authority for his constitutional arguments. **See** Code 19.2-266. We, therefore, conclude that the trial court properly allowed cameras in the courtroom during the proceedings.

VII. Motion for Continuance

On the morning of the third day of jury selection, March 4, 1992, the Commonwealth disclosed to,the court and defendant "arguably exculpatory" information, first learned after trial had commenced, and defendant immediately requested a continuance "to investigate." n5 However, finding that it was "clear that [the evidence in issue] constituted hearsay . and would be inadmissible in the trial," the court denied this motion. The court also noted that the "information" was already "in the mind of the defendant," and he "would be the source" of it. "The decision whether to grant a continuance is a matter within the sound discretion of the trial court. Abuse of discretion and prejudice to the complaining party are essential to

reversal." **Venable v. Venable**, 2 Va. App. 178, 181, 342 S.E.2d 646, 648 (1986); see also **Lowery v. Commonwealth**, 9 Va. App. 304, 307, 387 S.E.2d 508, 509 (1990). Under the circumstances here, we cannot say that the trial court abused its discretion in denying the motion.

VIII. Motion for Mistrial

During recross-examination of Detective Hoffman, the Commonwealth objected to certain inquiries pertaining to defendant's statements to Hoffman. In the presence of the jury, the prosecutor argued that

> what [defendant] may have said -- [defendant] is a witness available to the defense. He's not available to the prosecution. That's why the rules of evidence are the way they are. {*392} The issue is whether or not -- this witness can testify certainly to what his own statements were, but not to what the defendant may have told him. That would be hearsay. That's what my objection is.

Following further examination of Hoffman both by counsel for both defendant and the Commonwealth, defendant moved for a mistrial based upon the earlier comment and was overruled.

> In determining whether a remark falls within the boundary of the prohibition that a prosecutor shall not make an adverse comment before the jury on a defendant's failure to testify, the test is whether, in the circumstances of the particular case, "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a

comment on the failure of the accused to testify."

Williams v. Commonwealth, 4 Va. App. 53, 80, 354 S.E.2d 79, 94 (1987) (quoting **Hines v. Commonwealth**, 217 Va. 905, 907, 234 S.E.2d 262, 263 (1977).). "In order to prevail on appeal, [defendant] must show that he was substantially prejudiced by the improper comments of the Commonwealth's attorney." **Jackson v. Commonwealth**, 12 Va. App. 798, 799, 406 S.E.2d 415, 416 (1991); see also **Martinez v. Commonwealth**, 10 Va. App. 664, 669, 395 S.E.2d 467, 470 (1990), **aff'd as modified**, 241 Va. 557, 403 S.E.2d 358 (1991). New trials will be granted only "where the prosecuting attorney has so clearly departed from the line of legitimate procedure that **any reasonable person will conclude that the jury were certainly prejudiced thereby.**" **Winston v. Commonwealth**, 12 Va. App. 363, 369, 404 S.E.2d 239, 242 (1991) (emphasis added).

Upon a review of the "totality of the evidence," we are not persuaded that the comments in issue were so clearly prejudicial. See **Fain v. Commonwealth**, 7 Va. App. 626, 629-30, 376 S.E.2d 539, 541 (1989). The remarks were directed to the trial judge, not the jury, and nothing in the record suggests a reckless or deliberate procedural impropriety by the Commonwealth. Any related impressions gathered by the jury from the comments would be purely conjectural. Accordingly, we {*393} find that the trial court acted within its discretion and properly denied a mistrial. See **Cheng v. Commonwealth**, 240 Va. 26, 40, 393 S.E.2d 599, 607 (1990).

IX. Motion to Strike/Motion to Set Aside

At the conclusion of both the Commonwealth's evidence and of all evidence, defendant moved to strike on the grounds that the Commonwealth had not proven premeditation and deliberation, elements necessary to the offenses. These motions, and a similar motion and attendant argument to set aside the verdict, were denied by the trial court. In assessing the sufficiency of the evidence, we must view the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. **Martin v. Commonwealth**, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987). The credibility of a witness, the weight accorded the testimony, and the inferences to be drawn from proven facts are matters solely for the fact finder's determination. **Long v. Commonwealth**, 8 Va. App. 194, 199, 379 S.E.2d 473, 476 (1989). The jury's verdict will not be disturbed unless plainly wrong or without evidence to support it. **Id.** In **Epperly v. Commonwealth**, 224 Va. 214, 294 S.E.2d 882 (1982), the Supreme Court recognized that the premeditation and deliberation necessary to "elevate ahomicide to first degree murder" were issues within the "province of the jury." Id. at 232, 294 S.E.2d at 892. Considerations appropriate to this determination include "the brutality of the attack, . whether more than one blow was struck, the disparity in size and strength between the defendant and the victim, the concealment of the victim's body, and the defendant's lack of remorse and efforts to avoid detection." Id. Here, defendant ~dmitted brutal and unprovoked attacks on two small children with a deadly weapon followed by efforts to conceal the bodies. This confession, together with the other evidence, provided abundant support to the finding that defendant acted with the requisite premeditation and deliberation.

{*394} For the reasons set forth above, we affirm the decision of the trial court.

Affirmed.

DISPOSITION

Affirmed.

DISSENT

BENTON, J., dissenting.

On Monday, March 4, two boys, age nine and age seven, were reported missing in the City of Virginia Beach. Novak, a high school student who six weeks earlier had turned sixteen, participated in the search for the two boys. The police inquiry into the murder of the boys led them to question a number of people, including Novak. Novak had spoken to someone on the police "hot line" the day after the bodies of the murdered boys were discovered and said that he had seen them walk into the wooded area where their bodies were found.

On March 6, Novak's mother received a telephone call at work from Detective Hoover. He asked for permission to talk to her children. Novak's mother initially replied, "no," but consented after the detective pressed her for consent. After agreeing to the detective's request, she called home and learned that the detective was already in her home when he called. When she learned that the detective was questioning Novak in the detective's vehicle, she made arrangements to leave work.

That same afternoon, Giselle Ruff, a police evidence technician, took photographs of Novak's bedroom. Later that evening Detective Hoover returned and requested permission to talk to Novak in his car. Novak's mother

refused. At the detective's request, she agreed to take Novak to the police station. She stated, however, that when they arrived at the police station she was not invited into the room where Novak was interviewed for two hours.

Novak was upset when the police ended the questioning. The police told Novak's mother on Wednesday night that they wanted to talk to him again. She told them that she did not want them to talk to Novak unless she was present. {*395} Novak was again questioned at his home on Thursday afternoon, March 7, by Detective Tucker and perhaps others. When Detective Tucker called Novak's mother at work and asked for permission to talk to Novak, she became upset because they were again in her house talking to Novak. She told Tucker he could not talk to Novak.

Later that day, the detective called Novak's mother again and asked her to bring Novak back to the police station. On Thursday evening she brought Novak to the police station. Detective Hoffman questioned him for two hours. Again, Novak's mother was not invited in the interview room. During questioning, the detective discovered inconsistencies between Novak's statements and information obtained from other witnesses. Novak's mother was asked to bring Novak to the police department the next day for further questioning.
Novak's mother testified that she was particularly concerned and very protective of Novak in connection with police questioning. Novak had no previous contact with police or court history. She was also concerned because Novak's father, who was away on duty in the United States Navy, could not be reached. She had complained to the police about their previous interviews with Novak out of her presence and felt that she was being manipulated by the police department.

Novak and his mother arrived at the police station at 9:00 a.m. Saturday, March 9. When Detective Hoffman began the interview, he advised Novak and his mother that Novak was not a suspect and was not under arrest. The detective told her that he only wanted to clarify some things and determine whether Novak had seen something and not realized its significance. Novak's mother decided to remain in the interrogation room. Unknown to Novak and his mother, the entire session was videotaped.

Novak was not advised of his right to an attorney or to remain silent. After about thirty minutes of questioning, Detective Hoffman asked Novak's mother to leave the interrogation room. She reluctantly did so after Detective Hoffman assured her that Novak was not a suspect and that he wanted [*396] to talk with Novak about "sensitive areas not dealing with these kids." She left the interrogation room and remained in the lobby of the police headquarters.

After Novak's mother left, Detective Hoffman changed his position in the interrogation room so that he was seated facing Novak. Detective Hoffman recommenced the interview as other detectives viewed the interrogation through a one-way mirror and videotaped the questioning. The interrogation was stopped on several occasions, when Novak went to the bathroom, had a soft drink, ate a donut, and spoke once with his mother.

Detective Hoffman told Novak that he could rely on him and that he was not suspected of anything. However, Detective Hoffman began to lie to Novak as the interview progressed. He lied about police observations on the day of the search; he lied about the presence of a witness who saw Novak walking with

the two victims; he lied about new laser technology which enabled them to secure fingerprints; and he lied about Novak's fingerprints being found on the boys' clothing.

Detective Hoffman testified that he would not have told Novak any lies if Novak had not been a suspect. He testified that Novak became a suspect and the primary focus of the investigation during the course of the interrogation. He further testified, however, that he was "suspicious" of Novak when he began the interview.

Shortly before noon, Detective Hoffman assured Novak that he was not a suspect. He continued to interrogate Novak in a barely audible tone using lies and information gathered from other witnesses. Hoffman then confronted Novak with contradictions in his statements and the evidence gathered from other witnesses. The detective got Novak to admit being with the boys and then asked the following:

> Q Shawn, I know you cut the branches. I know that you cut them and covered them. Isn't that true?
>
> A Yeah. They had been on the ground. Were on the ground. I walk by. Monday.
>
> {*397}
>
> Q Shawn. You can talk to me. Don't be afraid. Get it out. Don't be afraid. Something happened and you went too far? Is this something that just happened?
>
> A Yeah.

Q You killed them, didn't you?

A (No audible response. Shawn nods his head in the affirmative.)

Q You killed Scott and Daniel?

A Yes.

Q Okay. Shawn, do you want to talk about it? Huh?

[There was a knock at the door.]

DET. HOFFMAN: I'll be back in a minute.

[Whereupon a recess was taken. Shawn is left in the room alone and is crying. After the recess Det. Hoffman returns to the room and the interview continues as follows:]

BY DET. HOFFMAN:

Q Shawn, are you okay?

A Yeah.

Q I need to read something to you. You have the right to remain silent. Anything you say can and will be used against you in court. You have a right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand these things that I

just told you?

A (Shawn nods head.)

Q Check here.

A (Shawn complies.)

Q Having these rights in mind, would you like to talk to me?

A (The witness nods head.)

Q Check here.

A (Shawn complies.)

{*398}

Q Sign your name for me right here.

A (Shawn complies.)

Q Do you want me to tell her or do you want me to wait?

A Let her know.

The detective continued to question Novak without interruption. Two hours after she was asked to leave the room, Novak's mother was informed by an officer of Novak's admissions. She demanded that the interrogation be stopped and that she be allowed to consult with a lawyer.

I.

Statements made by an accused during custodial interrogation and without proper Mirtundra warnings are inadmissible as evidence. **Demn v. Commonwealth**, 209 Va. 666, 667-68, 166 S.E.2d 228, 230 (1969). The Supreme Court has defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." **Miranda v. Arizona**, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) (footnote omitted). In making the determination whether a person has been deprived of freedom of action, the situation must be viewed from the perspective of "how a reasonable [person] in the suspect's position would have understood his situation." **Berkemer v. MCarty**, 468 U.S. 420, 442, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984) (footnote omitted). Merely "informing a suspect that he is not in custody and is free to leave does not necessarily mean that he is not in custody." **Wass v. Commonwealth**, 5 Va. App. 27, 34, 359 S.E.2d 836, 840 (1987). The circumstances that must be considered in determining whether an interrogation is custodial include "whether a suspect is questioned in familiar or neutral surroundings, the number of police officers present, the degree of physical restraint, . the duration and character of the interrogation, whether or when probable cause to arrest exists[,] when the suspect becomes the focus of the investigation[,] 'the language used by the officer to summon the individual, the extent to which he {*399} or she is confronted with evidence of guilt, the physical surroundings of the interrogation, the duration of the detention and the degree of pressure applied to detain the individual.'" **Id.** at 32-33, 359 S.E.2d at 839 (citations omitted).

The evidence proved that when Novak was interrogated on Saturday morning the circumstances effectively rendered the interrogation custodial. By virtue of his youthful age and lack of experience with the police, Novak had no basis upon which to conclude that he had not been deprived of his freedom of action. Novak was interrogated at the police station. The interrogation occurred in a small, closed room. He had been interrogated at the same place on two prior occasions. At each of those interrogations, the police separated him from his mother. On this third occasion his mother requested that she be permitted to remain in the room during the questioning. Half an hour later, however, with Novak present in the room, Detective Hoffman asked Novak's mother to leave. Hoffman admitted deceiving Novak's mother in order to get Novak alone in the interrogation room. When Novak's mother left, Detective Hoffman moved his chair closer to Novak, placing himself between Novak and the door in the small room. He also lied to Novak at least four times during the course of the interrogation.

Although Detective Hoffman testified that Novak did not become a suspect until contradictory facts were elicited during the course of the Saturday interrogation, the objective facts belie that assertion. Hoffman also testified that he was "suspicious" of Novak prior to the Saturday interrogation. Moreover, several photographs of Novak's bedroom were taken four days prior to this interrogation. In addition, the detailed questioning of Novak's conduct, movements, and statements during interrogations which lasted several hours each over the course of four days manifestly establish that Novak was a suspect in the police's investigation prior to this last interrogation. This last session was just the culmination of an investigation that focused upon Novak as a suspect.

{*400} The interrogation was accusatory, it was suggestive, repetitive, and deceptive. It was the last in a series of five interrogations that took place over a four day period. All of these circumstances surrounding this investigation as well as the events of the interrogation itself prove that the interrogation was custodial. Any reasonable person in Novak's position would have so understood. The detective used the opportunity to exclude Novak's mother and to bear down upon the sixteen year old in the confines of an interrogation room at the police station. Novak was questioned in the coercive setting of the police station in the absence of any **Miranda** warnings.

In determining that Novak was not in custody when he confessed, the majority posits that Novak voluntarily came to the police station with his mother that morning. Even if this interrogation was not custodial at its inception, the evidence proved that the atmosphere of the interrogation changed when Novak's mother was deceived into leaving the room. Detective Hoffman positioned himself closer to Novak, used ruses to trick him, and extracted his confession by accusing Novak of killing the boys. Under these circumstances, a reasonable sixteen year old would have believed that he was required to answer the police officer's questions and was not free to leave until he did so.

II.

"The burden is upon the Commonwealth to prove, by a preponderance of the evidence, that [Novak's] statement was voluntary." **Williams v. Commonwealth**, 234 Va. 168, 172, 360 S.E.2d 361, 364 (1987), cert. denied, 484 U.S. 1020, 98 L. Ed. 2d 681, 108 S. Ct. 733 (1988). "The test to be applied in determining voluntariness is whether the statement is the 'product of

an essentially free and unconstrained choice by its maker,' or whether the maker's will 'has been overborne and his capacity for self-determination critically impaired.'" **Stockton v. Commonwealth**, 227 Va. 124, 140, 314 S.E.2d 371, 381, cert. denied, 464 U.S. 873 (1984) (quoting **Schneckloth v. Bustamonte**, '412 U.S. 218, 225, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973)). Thus, an inquiry [*401] must be made into the circumstances of the interrogat~on, including "evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequence of waiving those rights." **Fare v. Michael C.**, 442 U.S. 707, 725, 61 L. Ed. 2d 197, 99 S. Ct. 2560 (1979).

An analysis of these factors coupled with the tactics used to extract the confession from Novak mandates the conclusion that Novak's confession was involuntary and not a product of his own free will. The absence of a parent is "a circumstance that weigh[s] against the admissibility of the confession." **Miller v. Maryland**, 577 F.2d 1158, 1159 (4th Cir. 1978). That circumstance must be given significant weight in view of Detective Hoffman's deliberate decision to deprive Novak of the opportunity to have a parent present who could provide assistance in asserting his constitutional rights.

The detective knew that Novak's mother had affirmatively stated that she wanted to be present. Novak's mother testified that on two occasions prior to the day of Novak's confession, police officers had called her at work asking if they could question Novak. She was adamant that any questioning be done in her presence. When she accompanied Novak to the police

station on Saturday morning, she asked to be in the interrogation room. After being told that Novak was not a suspect and that Detective Hoffman understood her concerns, she was asked to leave the room. Detective Hoffman admitted misleading Novak's mother so that she would leave Novak alone in the interrogation room. The detective's trickery is a compounding factor to be considered in the totality of the circumstances analysis. See **Spano v. New York,** 360 U.S. 315, 327, 3 L. Ed. 2d 1265, 79 S. Ct. 1202 (1959).

The detective lied to Novak's mother when he stated that heneededto talk to Novak about a sensitive matter unrelated to the dead children. As soon as she left the room, the detective began to question Novak about his involvement in the murders. The detective's deceptive conduct heightened the coercive [*402] atmosphere in which Novak made the confession and evidences the conclusion that the officer was attempting to overcome Novak's free will. See **Commonwealth v. MacNeill,** 399 Mass. 71, 502 N.E.2d 938, 942 (Mass. 1987) ("Deliberate police avoidance of a parent's participation in an exchange between the police and a juvenile ... would be highly suspect.").

The opportunity for a juvenile to have a parent present to afford protection for the free exercise of the juvenile's constitutional rights cannot be overemphasized. The Supreme Court has noted that "admissions and confessions of juveniles require special caution." In re Gault, 387 U.S. 1, 45, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967). Indeed, the Court has recognized that with juveniles "we deal with a person who is not equal to the police in knowledge and understanding Of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his

constitutional rights." **Gallegos v. Colorado**, 370 U.S. 49, 54, 8 L. Ed. 2d 325, 82 S. Ct.. 1209 (1962). Several states believe that the presence of a parent or other adult representative is so important that they have a per se rule that requires that a juvenile be given **Miranda** warnings and the opportunity to consult with an adult who understands these rights before an admission may be obtained from a.juvenile. **See Commonwealth v. A Juvenile (No. 1)**, 389 Mass. 128, 449 N.E.2d 654 (Mass. 1983).

In addition to misleading Novak's mother, Detective Hoffman admitted lying to Novak during the interrogation. His lies and trickery are factors that weigh heavily against a finding of voluntariness. Spano, 360 U.S. at 327; **Rodgers v. Commonwealth**, 227 Va. 605, 614, 318 S.E.2d 298, 303 (1984). The detective's lies, coupled with leading and "suggestive questioning," **Morris v. Commonwealth**, 17 Va. App. 575, 580, 439 S.E.2d 867, 871 (1994), constitute conduct designed to provoke Novak's confession. Detective Hoffman's tactics cannot be viewed only in light of the nature of the questioning. His exploitative tactics were practiced on a barely sixteen year old youth who had never {*403} before been involved in any criminal activity. A juvenile's lack of "previous exposure to the criminal justice system" also is a factor that weighs against a finding of voluntariness. **Green v. Commonwealth** 223 Va. 706, 710, 292 S.E.2d 605, 608 (1982).

The record clearly established that during the interrogation Novak's responses accorded with Officer Hoffman's suggestive questioning. Novak, who, according to the prosecutor's psychiatrist, exhibited signs of "immaturity" and "a need for being recognized and appreciated" was no match for Hoffman's skill in extracting confessions. Under the best of circumstances,

a sixteen year old "boy, no matter how sophisticated is unlikely to have any.conception of what will confront him when he is made accessible only to the police." **Gallegos,** 370 U.S. at 54. Another factor to be considered is the failure to give any **Miranda** warnings until after Novak made his admissions. "Proof that some kind of warnings were given or that none were given [is] relevant evidence . of whether the questioning was in fact coercive." **Beckwith v. U.S.,** 425 U.S. 341, 348, 48 L. Ed. 2d 1, 96 S. Ct. 1612 (1976). The detective testified that he considered Novak "suspicious" before the interrogation, and that, as the interrogation proceeded, Novak became a suspect. It was not until Novak confessed and Hoffman was interrupted by another officer who had Been observing the questioning, however, that **Miranda** warnings were read to Novak. Furthermore, the videotape of the session established that'the warning was given in barely audible tones while Novak was clearly upset. The officer then addressed Novak,s level of understanding only in a perfunctory fashion and obtained his written waiver, by causing him to make a check mark without explanation. The interrogation then proceeded without interruption.

Because all of these factors unequivocally establish that Novak was deprived of his freedom of action and that NoVak's confession was involuntary, I would hold that the Commonwealth failed to prove that the confession was voluntary and {*404} admissible. Accordingly, I would reverse his conviction. I dissent.

OPINION FOOTNOTES

n1 All citations to Code 16.1-269 in this opinion refer to the statute as amended in 1990.

n2 Code 16.1-269 (A) (3) (b) reads in pertinent part:

When the alleged delinquent act is armed robbery, rape as provided in 18.2-61 or murder, or when the child has previously been tried as an adult and convicted of a felony and is presently alleged to have committed an act which would be a felony if committed by an adult, the court may certify the child without making the [amenability to treatment] finding required by this subdivision.

n3 Circumstances relevant to this determination include defendant's age, intelligence, background and experience with the criminal justice system, police conduct, surroundings, physical restraint, length and character of the interrogation, and the focus of police suspicion. See **Harrison v. Commonwealth**, 3 Va. App. 260, 265, 349 S.E.2d 167, 169-70 (1986); Wass, 5 Va. App. at 32-33, 359 S.E.2d at 839; **Kauffmann v. Commonwealth**, 8 Va. App. 400, 404-05, 382 S.E.2d 279, 281 (1989).

n4 At thetime of defendant's trial, the Circuit Court for the City of Virginia Beach was among several trial courts participating in an experimental program which permitted such coverage of judicial proceedings pursuant to former Code 19.2-266.

n5 A "memorandum" of this "information" was apparently prepared by the Commonwealth and provided to defendant, but it could not be located in the record. See **Turner v. Commonwealth**, 2 Va. App. 96, 99, 341 S.E.2d 400, 402 (1986).

FINDINGS OF FACT - CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH, VIRGINIA

Excerpt from Transcript of the Hearing on the Motion to Suppress held before the Honorable J.K. Moore on February 4, 1992

(MR. HUMPHREYS:) ...amended report, then I could only point out it was made at the defendant's request. Now they seem to be seeking to use that to bolster this Eighth Amendment argument somehow to consider all the information that might have been available.

The other point that I would like to make is that Justice Scalia in his opinion says that one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age. Sentencers is the operative word there. This court will be the sentencer in this case if it becomes appropriate. The point I would make is that language referred to following the word moreover that Mr. Mahan and I alluded to of Justice Scalia simply referring to these two statutes. There is nothing in that paragraph to suggest that other states must adopt similar statutes. He simply points out that these two statutes, in addition to the protection provided in the twenty-nine states that he cites in the preceding sentence, provides the additional protection. If that isn't dicta, then, Your Honor, I don't know what that is. Thank you.

THE COURT: Thank you very much for the thoroughness of your citations and argument on both of the motions before the court. The court has over the past two days listened very carefully to the evidence presented and has had an opportunity not only over the last two days but over the last twelve and a half years to read and review the cases applicable to the motion to

suppress in great detail and great length. I'm prepared to rule on those motions at this time. I'll rule on them in the order in which they have been presented.

The first is the motion to suppress filed by the defendant, Shawn Novak, objecting to statements he made in the interview conducted by Detective Hoffman on Saturday morning, March the 9th of 1991, and the fruits of that statement as well. As I understand the defendant's contention in this case, they are stating that first of all, Shawn Novak's statements were involuntary and in essence without the benefit of having been given his Miranda rights or warnings. In support of that, I think the defendant's argument can be broken down really into three categories. The first is that the police failed to advise Shawn Novak of his Miranda rights. Secondly, that they interviewed Shawn Novak, who was sixteen years old at the time, without his mother or a parent or a guardian being present. Three, that during the course of their interview with Shawn Novak, they lied to him or employed a ruse or trickery, which they say resulted in a confession to this crime.

There really are two issues for the court to decide in this case. First of all, was it necessary at any point to advise the defendant of his Miranda warnings? The court's answer to that question is, no, that the Miranda warnings only need to be given during a custodial interrogation; and that term has been more than adequately referred to and defined by the cases over the years. In other words, that is questioning which, according to the cases, was initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of actions in any significant way.

From my review of all the facts and circumstances in

this case, the court is of the opinion that the defendant was not in custody or even being interrogated as that term is commonly defined in the cases during the course of this interview. Shawn Novak was being interviewed by the police along with many, many other young people and other witnesses obviously in the hope that they would be able in some way or another to provide the police with information which would aid them in their investigation in solving what appeared to be a very gruesome murder of two young boys.

The interview on Saturday morning was really more of a fact-finding exercise than an interrogation. After all, look at the background of that interview. Shawn was a young man who lived in the area where the crime occurred. He had participated in the search of the woods surrounding the area where the crime occurred. He apparently was present or very near where the bodies were found at the time they were found. He apparently had volunteered some information by calling the police hot line and identifying himself. He revealed in several interviews prior to Saturday that he had seen the boys on Monday afternoon shortly before they were deemed to be missing.

In my opinion, at no time was the defendant in custody during any of this interview. He never had been charged with a crime. He was told by Detective Hofman in the presence of his mother that he was not a suspect. He was never arrested for anything, and he was certainly not under arrest at any time during the interview. He was never told that he could not leave. In fact, he never asked to leave or to terminate the interview. The mere fact that the interview was held in the police department is not evidence and does not cause me to arrive at the conclusion that it was in custody, and there are cases that support that

proposition.

In short, Shawn Novak was not deprived of his freedom in any significant way during the interview on Saturday, March the 9th of 1991. Subsequently, towards the end of that interview when he nodded his head in affirmation that he had killed the boys, he was immediately advised of his Miranda rights. He made a knowing and intelligent waiver of those rights in my opinion. He signed the written waiver form. He acknowledged that he wished to make a statement. His signature is in evidence on that form. He continued to talk to the police and make a statement. For that reason, the Court finds that there was never any time up until Shawn Novak shook his head and acknowledged that he had murdered the boys or killed the boys that the Miranda warnings or rights were ever required. That is only the first issue.

The second issue the court has to rule on is whether or not the statements made by the defendant were voluntary. In that situation as in the first, the court -- the Commonwealth does have the burden of proving the voluntariness of a statement or confession by a preponderance of the evidence. The cases have referred to the word voluntary in a number of different ways. It might be important just to review some of those definitions very briefly.

The courts have said that to be voluntary, a statement must be the product of a rational intellect and a free will or the product of an essentially free and unconstrained choice by the maker. We're looking at that definition in the alternative. The question becomes whether or not the maker's will has been overborne and his capacity to self-determination is critically impaired. Voluntariness as Mr. Zanin referred to is a factual issue

for the court to determine after considering the totality of the circumstances. Those circumstances have rather historically been categorized into two groups -- first, factors regarding the physical and psychological condition of the suspect himself and, secondly, those factors which relate to the police interrogation and tactics. In looking briefly at the factors which relate to the physical and psychological condition of the suspect, three of them are the age, the intelligence, and the education of the individual. In this case from a review of the evidence presented, it's clear to me that Shawn Novak was highly intelligent. He was a high school student. He was articulate in his answers to the questions being asked of him. He obviously understood everything that was being asked. He gave appropriate responses to those questions.

I might add that reviewing the interview on tape was very, very revealing. While I'm sure that for those of you in the courtroom who were reviewing it on the video without the benefit of the transcript, it was probably difficult to hear; but in reviewing the tape recording of the interview of Shawn Novak with the benefit of a written transcript of the interview, that tape recording became highly revealing and comprehensive in my opinion.

The defense makes a great deal to do about the fact that Mrs. Novak, although she had been present for many of the interviews and for approximately the first half of the interview Saturday morning, did leave the interview and was absent from the room and out in the lobby or the hall of the police department during the course of the interview during that period of time when Shawn Novak actually admitted to the killing. There's absolutely no legal requirement under the law that a parent or guardian be present during an interview of a

juvenile in order for any statement made by the juvenile to be admissible at trial.

I will concede, however, that the absence of a parent or guardian during such an interview is, in fact, circumstances which the court must take into consideration along with many other facts and circumstances in making that determination of voluntariness. Several other factors that impact on the subject himself are the prior experience of the police. We don't know what Shawn Novak's prior experience with the police was other than the fact that he had three or I thought up to four prior interviews with the police about this particular event prior to the interview on Saturday morning.

It's interesting to note again that Shawn was a very willing participant. He volunteered to be a part of the search team. He called in. He came down voluntarily to the police department. He participated in these interviews ostensibly with the motivation to try and aid the police.

Other factors include the use of drugs or alcohol, and there's absolutely no evidence of that. The emotional or mental disability of the individual, and there's absolutely no evidence of that. The deprivation of physical comforts -- that conjures up long, isolated interrogations late at night. This is on a Saturday morning with the defendant's mother present, smoking cigarettes and drinking Pepsi, smiling, and obviously in complete control of himself and obviously with a full understanding of the interview process and what was being, said and why he was there.

The court also has to look at some of the police interrogation tactics. The one that the defendant relies

on primarily is the fact that the interviewer, Detective Hoffman employed deceit or trickery or lies, and somehow that as a result of that, the defendant was caused to confess to something that he maybe wouldn't have confessed to had those ruses been not employed. I suppose that there's the question of causation here as well that the court has to evaluate. Counsel has referred to a number of cases regarding the use of trickery or deceit or lies by the police in the course of an interview.

I know you referred to the most recent case that was just handed down in January, Wilson v. Commonwealth; and, frankly, I would have quoted it, but you have it and have already quoted it. It supports the proposition that while that particular tactic may offend some people's sensibilities about what is fair in the criminal justice system, it is not illegal or improper and is only one fact to be taken into consideration by the court in arriving at a finding of whether or not a confession or statement was voluntary. There is no prohibition about that tactic under the law.

Other factors would include such things as psychological pressures. I don't know of any psychological pressures in this case. Threats or promises of leniency there's absolutely nothing along those lines. Then let's look at the whole duration and the circumstances of the interview itself, remembering that this is a criminal investigation involving the apparent murder of two young children. Those circumstances were as I've already said, and I don't mean to repeat myself, but this was a rather benign interview in all its respects. The defendant was there voluntarily with his mother. It lasted certainly no longer than two and a half hours with several breaks in between. There was never any attempt by the defendant to leave; and,

frankly, my impression from watching the tape and listening to the interview is that if the defendant had said, I'm through, I want to leave, he would have left.

I say again viewing the two and a half hours of that tape were extremely helpful to me in making this determination. It presented a very, very comprehensive picture in my mind as to what the totality of the circumstances were notwithstanding the bad audio because I had before me about a ninety-five-percent verbatim transcript. So after considering all of the evidence and what has been referred to as the totality of the circumstances, the court finds that the statement was a voluntary statement made by the defendant without any fear or threat or intimidation of any kind whatsoever. Accordingly, the court is going to deny the motion to suppress as filed by the defendant.
The other motion filed by the defendant has to do with the death penalty and whether or not it can be imposed in this particular case or even if it's a possibility in this particular case. The court has reviewed the defendants brief in great detail and listened to the argument. I'm satisfied that the Commonwealth has indicated that all of the -- except possibly the first -- of the grounds for that argument have been dealt with numerous times by the Virginia Supreme Court. I think most recently in the case of George v. Commonwealth decided in November of 1991 by Chief Justice Carrico of the Virginia Supreme Court. It was also a capital murder case that dealt with the numerous issues raised by the defendant.

As to the question of the death penalty with regard to a sixteen-year-old, I agree that the case of Stanford v. Kentucky and Wilkins v. Missouri decided by the Supreme Court of the United States in 1989 is dispositive of that issue and that the statutory scheme

both in the juvenile and domestic relations district court law and in the capital murder statutes of this state satisfy the requirements of the plurality opinion of that decision. Therefore, the court does uphold the possibility of the death penalty on a sixteen- and seventeen-year-old. For that reason, the court is also going to overrule the motion to prohibit the death penalty in this particular case. If you'll prepare an order--

MR. HUMPHREYS: Yes, Your Honor.

THE COURT: -- bearing out both rulings. I'm referring simply to the reasons stated by the court. I would appreciate it.

MR. BRYDGES: If the court would respectfully note our exception, Your Honor.

THE COURT: Yes, sir. If nothing else, we'll be adjourned.

(The hearing adjourned at 5:00 p.m.)

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VIRGINIA: IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON FRIDAY THE 1ST DAY OF MARCH, 1996.

Shawn Paul Novak,
Appellant,

against Record No. 951404
Court of Appeals No. 1416-92-1

Commonwealth of Virginia,
Appellee.

Upon a Petition for Reheating

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 10th day of January, 1996 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Koontz took no part in the consideration of this case.

A Copy,
Teste: (s)_____
Clerk

DET. HOFFMAN: I want you to know, first of all, he's not under arrest.

MS. NOVAK: I know that. I have been upset about -- I just don't feel like this has really been -- I'm not -- I don't like secrets. You know, I just pretty much say what's on my mind.

DET. HOFFMAN: Uh-huh.

MS. NOVAK: And I feel like I have a responsibility to protect him, and I was going to come in here and I really was not going to let you talk to him unless you let me be in here and recorded it, but I feel a little bit better than I did when I came in here.

DET. HOFFMAN: Okay. We -- what we've got, let me explain to you, we have had kids down here -- he's been down here the least. I've got kids down here five and six times that we've talked to. What happens is, the kids have a wealth of information to us. They have told us things and we keep going back and every time I talk to one of the kids, they remember something else, and Shawn has probably told you, the first time we talked he told us about certain things. The second time we talked he remembered other things that were helpful to us in our investigation, and now I've got other kids that have told me certain things, and we're back again to see if I can refresh his memory as to what exactly is going on, and we'll go back over the whole story again, and every time I find something new -- he saw something, the other kids have seen certain things, so that's where I'm at.

MS. NOVAK: Okay, well, like I said, I do feel better than I did when I come down here.

DET. HOFFMAN: A lot of times the reason we ask the parents if we can speak alone is because we have been in several interviews with the kids, and one of the parents was present and we had to go back and talk to

the kid. He found out that what he was doing was drinking beer, and we didn't say anything, and we had that beer can here in place and they didn't want to say anything in front of Mom and Dad. You know, we lost a day right there in our investigation, dealing with that, trying to find out where this came from, where did it come from, so forty-five people that are assigned to this, we've lost a complete day; and I don't have any problem with the parents sitting in, but then I have to beg and plead, you know, please let me talk to them alone, and sure enough, within five minutes, it's out, you know, and of course, I didn't go back and tell the parents. It's not going to hurt, all right? If it was just something minor, I would say, hey, a beer can, you know, but there are certain things kids sometimes don't like to discuss right in front of Mom or Dad and that's what I'm saying.

MS. NOVAK: Well, I understand that and I've told Shawn, and he told me, you know, he don't have any more big secrets that he's hiding out and, you know, he said he felt he could talk in front of me. I did understand that. That's why I let you talk to him alone in the beginning, but I just felt that my wishes were not being, you know, I was upset over the first night because he was upset. Last night he come out feeling great and I said, "Okay. Fine. Everything is okay"; and then I get another call and I think, well, you know, I mean, I'm a parent. I've got to be suspicious, you know. Maybe I'm wrong to be that way, but my husband's gone, so I have, you know, I'm responsible and --.

DET. HOFFMAN: Well, I understand. Believe me, I do understand, and this is the reason we like to talk to the kids alone, too, for those reasons. It's not to hide something from you okay.

The first thing, we ended up talking about the subject, and that was found out the first night and certainly, I don't believe that he probably told me yesterday, the other day, with you probably sitting here. Now, he has

since told me, I'm sorry, he told us, and he probably feels better about it.

SHAWN NOVAK: (Undiscernible.)

DET. HOFFMAN: Yeah, well I understand, but it was something I don't think you probably told right in front of Mom, you know, and see, that's what I'm saying. There are certain things I would like to ask him today, I don't know, we'll see, things that I would like to get clarified, and, you know, it's going to inhibit me and I hope I don't lose any more time with this. I've got to get rolling with this thing and you know, we've got seven people out here. We just don't want to lose any more time and that's where we stand.

MS. NOVAK: I understand that, and I've told him he's not going to be punished severely or anything. If he's got anything else that he wants to tell you, just feel free to talk.

DET. HOFFMAN: I'm sure he'll tell you nobody, to my knowledge, has raised a voice to him, and certainly, with he and I talking, I have never (raised my voice to him, never. I have never yelled at him, got up, stood up, done anything that might have --

SHAWN NOVAK: I have to admit he's been cool.

DET. HOFFMAN: -- that you know, that would, you know, make him fearful of me, and I don't believe we operate like that. That's in the movies or something.

MS. NOVAK: Maybe I've seen too many movies, I don't know, but, you know, I just will feel better if I sit in this time and then we can go from there.

DET. HOFFMAN: All right. I'll just make notes and everything.

MS. NOVAK: I'll just sit back here and keep my mouth shut. I won't interrupt.

DET. HOFFMAN: Okay.

INTERVIEW

BY DET. HOFFMAN:

Q Shawn, let me go back a couple of days. Like I said, I have talked to some of the kids, and certain information has come to light that I need to clarify, just like we've done in the past few days. I would like to go back to Sunday, what you did Monday, Tuesday, and go back again through those things and make sure we've got everything correct. I took notes the other day on this and I've talked to a friend of yours, John Klepper.
AI talked to him.
QOkay. I talked to him and I talked to Louis Rich. I've talked to a lot of people.
A(Undiscernible.) Okay.
QWhen was the last time you talked to Klepper?
AYesterday.
QAfternoon?
AIn the morning.
QOkay. Okay; and Rich, you talked to him last night, and so you know, we have been talking to everybody. Okay. Let me just -- Sunday; what were you -- what did you do Sunday?
AWe I believe we went to church in the morning, didn't we?
[Ms. Novak nods head.]
QOkay, so --
AI don't know.
QWell, let me just get what you can remember. I can always ask Mom later and everything like that.
AI went to church.
QWell, that's okay. It's no problem. It's no problem; just what you can remember as far as Sunday. I mean if you say -- I can always clarify with Mom later.
ASunday, I really can't say. Just a normal day, nothing happening, just, like walk around.
QOkay. Let me ask you, do you know if you went over into the woods Sunday any at all?
A I don't think so. No, I didn't. I called her up to ask if I could walk up to the store with Jimmy. We

went out on the road, that goes about halfway up there.
Q Okay.
A And we stayed in McDonalds for about fifteen minutes and I just walked there and we walked back.
Q So at one point you went to McDonald's with James, right?
A Uh-huh.
Q And is this in the afternoon or morning?
A Afternoon.
Q And do you recall seeing anybody else on your way to McDonald's near the woods, any of the' other guys that you know?
A No. We saw Donna at McDonalds. We talked to her for a few minutes.
Q Okay. Who's that?
A They were the only ones.
Q Donna?
A Yeah.
Q Does she work there?
A Yeah.
Q Okay.
A And I think Mike was working.
Q Okay. All right; and let's go ahead and see what you did Monday. Monday you went to school, correct?
A Yes.
Q How did you get to school?
A The bus.
Q Okay. So you got the bus to school Monday, okay, correct? You had been at school the entire day?
A Right.
Q Okay. All right. How did you get home from school?
A The bus.
Q Okay. You took the bus home from school, and where -- you got off where?
A Tappan Court.

Q On Monday?
A Yeah, every day.
Q Okay.
A (Undiscernible.)
Q Okay, so you got off at Tappan, right?
A Uh-huh.
Q Okay; and if you will, just tell me your daily activities.
A Monday?
Q Monday. You got off the bus and where did you go at that point?
A Home first, drop my books, grabbed something to eat, waited for my brother to get home, normally I'm supposed to wait on David.
Q Okay.
A (Undiscernible) and order pizza and I saw them go in the woods and I start walking around it (undiscernible) back home and I got (undiscernible) by the road and--
DET. HOFFMAN: All right. Wait a minute. Let me back up just a little bit. You understand why these interviews take so long? Because we go by what's next, what's next, what's next, for some time. It takes us a while to go through Monday and then I've got to go through Tuesday and I want to be accurate when I do something, because every little detail, it may not even be significant to him, may give me a clue into something else, and this is why I'm taking it day by day, and what did you do next, what did you do next, what did you do next, and I've got stacks of paperwork of all of the kids, and believe me, some of them do know stuff, you know.
BY DET. HOFFMAN:
Q Okay. So you think you came home, took your books home and everything else. You get off the bus on Tappan Zee. Can you give me an estimate of what time that was?
A We get out of school at two, it would be about

somewhere in the area of 2:30.

Q Okay; about 2:30. You drop books off and everything, how long did you stay at home?

A Jimmy gets home about three or quarter after three and I would say a few minutes later.

Q You waited until Jim got home, and that's your brother, right?

A Yes.

Q How old is your brother?

A Fourteen. I'm not sure. I know (undiscernible.)

Q Okay. So he got home about three to quarter after three?

A Yeah.

Q Okay.

A I think the bus gets back at three and he was talking with his friends outside.

Q Okay; and then you leave the house,right?

A (Shawn nods his head.)

Q What are you wearing when you leave the house?

A I believe I had my Harley shirt, gray jeans. Harley shirt is what color?

A It's black. It's got a big eagle on

Q Big white eagle?

A Yes.

Q I mean is it a big one or--

A Yeah, (undiscernible.)

Q And gray jeans did you say?

A Yeah, I think that's what I had on and this.

Q And a gray jacket; is that right?

A Uh-huh.

Q All right. So -- okay. So you go outside, and where do you go?

A I walked around, you know, through the courts for a little while and then I went past Jim's house and I wanted to know if he wanted to go to the store with me. I told him that I thought I might look at that skate

ramp, that was, you know, up there.

Q Okay, so you saw -- this is Jim Young, correct?

A Yes.

Q And you see him in the -- I mean, do you go in the house?

A No. No. Him and Andy Mannis were out in his back yard and I was walking by and (undiscernible.)

Q Okay. So you never went into the Young's house.

A Right.

Q Okay. So you just walked by the back yard and what did he do, just ask you where you were going?

A Yeah.

Q Okay.

A I told (undiscernible) and he said, "What are you doing?" and I said, "I'm going to go look at the skate ramp" and he didn't want to walk that far and then I come right back home.

Q And you saw Jimmy?

A Uh-huh.

Q In his back yard?

A Uh-huh, with Andy.

Q Andy who?

A Mannis.

Q Mannis?

A Mannis, yeah.

Q Okay; and Jimmy asked you, "Where are you going?" and you told him the store and possibly the skate ramp.

A Yes.

Q And this is -- let me get my map here

A (Undiscernible) would make it easier.

Q I don't know where it's at. It's in a mess of paperwork. This is Wadsworth, right?

A Yeah, I know.

Q Okay; and we're talking about -- this is Treefern.

You're familiar with that, right? You're talking about the skate ramp somewhere in here, right?

A Yeah.

Q All right.

A There is a big trail that comes up the back here.

Q Okay.

A He was there. He lives in Catskill here. He was there. I was walking up through the trail here.

Q Okay. Wait a minute. Okay. So Jim asked, "Where are you going?" You told him, "to the 7-Eleven."

A No. I said, "the store."

Q Okay; the store, and you go here, and that goes to the skate ramp, correct?

A (Shawn indicates his route on a map.)

Q All right. Now, you pass them and you

A Go up to the store. I stopped in at the 7-Eleven.

Q Okay. Now, which way do you go?

A Up Birdneck Road.

Q And you go Prosperity to Birdneck?

A I crossed Prosperity.

Q Okay. What I'm saying is, did you cut through the woods here or--

A I went, like I said, I cut through this court and when I got out of this court, I just walked up the road.

Q So you went from Wadsworth across Prosperity, down Birdneck, okay?

A (Shawn indicates on the map.)

Q Okay. So, you've got 3:15 and you're walking around a little bit and you run into Jimmy and how long, can you give me an estimate you walked around?

A About, maybe four.

Q Okay; and how long did it take you to get to the 7-Eleven?

A There and back maybe forty-five minutes. It depends on how long you're in there.

Q Okay. Well, on this particular day?

A I would say between thirty and thirty-five.
Q I mean going up there. I'm sorry. To go up there. When you walked up there how long did it take you to get there?
A Five to ten minutes.
Q Okay. Okay; and so somewhere in the general area of maybe 4:15, okay, that you get there; is that accurate, or somewhere near there or--
A I think so.
Q Okay. Okay. That's fair. That's fair. And on the way did you see anybody?
A No.
Q Nobody?
A No cars, but --
Q Nobody on foot?
A I don't remember any walking there.
Q How about any friends? Did you see any then?
A (Undiscernible.)
Q You don't recall seeing anybody in that area, anything out of normal for you?
A No.
Q Did you see anybody at the 7-Eleven that you knew?
A Not friends of mine. I recognized the people that worked there.
Q Okay. All right. You didn't see anything unusual up there?
A No.
Q Nobody that looked out of place or anybody that acted suspicious or anything like that?
A No.
Q Okay. How long did you stay there?
A About as long as it takes to get a drink.
Q Okay.
A (Undiscernible.)
Q Okay. On the way back?
A Yeah, (undiscernible) I walked back.

Q Okay. Did you stay there long?
A No, I just walked through,
Q You didn't see anybody, anybody suspicious?
A No.
Q Anybody out of place, acting strange?
A Uh-uh.
Q Okay. All right. Now, when you go to McDonald's, you go which way?
A I went up this road, around this way.
Q Now, we were talking the other day about this, and this is why I wanted to get back with you to see if you could remember.
A I might have gone this way.
Q Okay. You're not sure if you took the trail or the road back to Wadsworth, right?
A I remember. I wasn't with anybody and I didn't see anything unusual or anything.
Q Okay. Did you see anyone on the way back home?
A No.
Q Did you see anything that was--
A Out of the ordinary?
Q -- out of the ordinary, anybody walking around; nothing suspicious?
A Uh-uh.
Q Okay. Anyone you knew?
A (The witness shakes head.)
Q You didn't run across anybody.
A Uh-uh.
Q All right. So you go back to Wadsworth. Okay. What time do you arrive, say at the neighborhood, at that subdivision would you say?
A It would be about 3:30, 3:45 (undiscernible.)
Q Okay; and where do you go from there? You okay?
A I went up to the park.
Q Okay. You went to the park?

A Yeah, and there was a couple of little kids there and I walked along the big metal fence, the woods right next to the golf course, and I walked up the fence there and then along the fence in front of Wadsworth and towards the road, (undiscernible) I took a right and came home.

Q Okay. How long did you stay at the park?

A Uh, for a while.

Q Not thirty?

A No, it wasn't that long. It was five to fifteen.

Q Would it be fair to say fifteen tops?

A Yeah.

Q Okay. I want to make sure you're sure about that. I don't want to put anything into your mouth.

A No. I think so.

Q Okay. So it would be fair to say fifteen tops then.

A (Shawn nods his head.)

Q So that will bring us up to about five o'clock, five p.m., okay. So you leave at five p.m., leave the park. You said you saw some little kids. Did you recognize those kids?

A I probably knew them at the time. I can't think of who it was.

Q Do you know their names or anything?

A No. (undiscernible) a couple of kids there and I left. (undiscernible.)

Q I know you don't. I know you don't. Were they there or you just can't remember if they were or not?

A I know there were a couple of kids there.

Q Okay. All right. Have you seen those kids before?

A I'm sure I probably have, in Wadsworth.

Q Okay. All right. Did you see anyone at that location besides the kids?

A No.

Q No adults, teen-agers, anyone you recognized in

the area, anything suspicious, any strangers or anything like that?

A Uh-uh.

Q Okay. Okay. You leave the park at five p.m. and you walk around to the back, to the front of Wadsworth, and you're coming up along, okay, you walked near the fence to the golf course, right?

A (Undiscernible.)

Q All right. Let me -- maybe this will help us.

A All right. The park is right in here.

Q Okay. We'll mark that. Okay. So that's the park, okay.

A I walked through there.

Q And you walked--

A I walked through there.

Q I'm sorry. I'm not familiar with that area really, for that. I mean --

A This fence along here.

Q Uh-huh.

A I walked up along on the inside of this, here, next to the golf course.

Q Uh-huh.

A I walked along there and there is a hole in the fence and I walked down to the sidewalk.

Q Uh-huh.

A And I walked along the inside and (undiscernible) and I came out there.

Q All right. So you walk along the fence from the park and that's the golf course, right?

A Uh-huh

Q From the side of the golf course on the side of Wadsworth?

A Uh-huh.

Q Okay; and then you go through a hole in the fence and--

A It's not really a hole. There is a gap there.

Q Oh, okay.

A I came out and (Shawn indicates on the map.)
Q Okay. So you go through there and cut -- all right. At that time you're on Prosperity, right? Does that run with Prosperity?
A Yes.
Q Okay; and through the entrance of Wads.
A Yes.
Q Okay. Now, how long do you think it takes you to do that?
A About fifteen minutes.
Q And so is it fair to say that's placing you at the front of Wadsworth at 5:15 p.m.?
A If all the times are right.
Q Okay.
A I got there about 5:00 or 5:30.
Q Okay. Well, I know we can't be accurate, you know what I'm saying, to hold you to these times. Well, all right. Let me do this. Was it definitely after 4:30?.
A Yeah.
Q Okay. So it was definitely after 4:30 when you arrived at the entrance of Wadsworth and you have to walk around?
A (Undiscernible.)
Q Okay. Would it be fair to say it was definitely after five o'clock?
A Not necessarily.
Q Not necessarily. Okay. All right.
Q Let me back up another fifteen minutes then. Would it be fair to say it was definitely after a quarter of five?
A I can't say.
Q Okay, but the only thing you can say definitely is it was definitely after 4:30.
A Yes.
Q Okay; and when you say you walked in, just a little bit inside Wadsworth.
A Yes.

Q Okay. On the way walking through the fence near the golf course did you see anyone?

A I probably did (undiscernible.)

Q Okay; nothing at all, strangers, friends, anyone you knew in the area, the immediate area, nothing unusual to you?

A Uh-uh.

Q Nothing that led you to be suspicious?

A No.

Q Okay. So you walked in the front of Wadsworth, and you walked in just a little bit and then you -- what occurs then?

A I saw the kids there again and by the time I got to Hudson they come up to where I was and I said, "Hey, Daniel, how are you doing?" And he rode around a little while and rode across.

Q Okay; and so you saw him riding up to you and you were at Hudson.

A Yeah.

Q And you definitely know Daniel, correct?

A Yeah, and he was with -- but I didn't because the other kid.

Q And there was Scott, right. Do you know him by name?

A No, I didn't.

Q Not at that time you didn't know him by name?

A I recognized his picture in the paper and knew he was with Daniel.

Q Okay. What did they say to you?

A Something about (undiscernible) they went towards the lake.

Q (Undiscernible.)

A (Undiscernible.)

Q "Lake" meaning?

A Here.

Q You're pointing over there--

A (Undiscernible.)

Q Rode several times down the aisles?
A Uh-huh, and (undiscernible) here.
Q And then they went across the street into the woods?
A Yeah. There is a trail there.
Q Okay; and they were walking or riding?
A Riding.
Q Okay; and can you tell me what they were riding?
A A couple of bikes. (Undiscernible.)
Q Can you describe them? Maybe a color of Daniel's?
A I think it was dark (undiscernible.) I'm not sure.
Q Was it more of a black or more of a whiter color?
A Black, I think. I'm not sure.
Q Uh-huh. How about the other kid's?
A I think it was white or yellow.
Q All right.
A It was a light color.
Q All right. Do you want a drink of water or something?
A Yeah. That would be cool.
Q Why don't we do that and take a break.

[Whereupon a recess was taken, after which the interview continued as follows:]

DET. HOFFMAN: Do you feel comfortable?
MS. NOVAK: Yes, now.
DET. HOFFMAN: We're getting into an area where I want to ask a few questions. Is there any possibility at all I could talk to him by myself. I know how you feel, but I'm trying -- this is what we've gone over. If you ask him, this is exactly what we've gone over time after time. There is a couple of sensitive areas not dealing with these kids, but dealing with a few things I want to ask him about. I need to, you know, I want to have your

permission. Why don't you ask him, not in my presence, and talk to him for a second okay, and that way maybe you will feel comfortable.

SHAWN NOVAK: I don't have a problem.

DET. HOFFMAN: Well, I'll let y'all talk for just a second. Let me butt out a minute, okay, Mom. All right?

SHAWN NOVAK: All right.

[Det. Hoffman left Shawn and his mother alone.]

MS. NOVAK: You've already told him everything, haven't you?

SHAWN NOVAK: I think so. I can't think of anything to tell him.

MS. NOVAK: Well, what do you think?

SHAWN NOVAK: (Undiscernible.)

[Det. Hoffman returns to the room.)

DET. HOFFMAN: Listen, for some reason if I'll just run this by you, okay, real quick. I don't know how you feel, or anything like that. if for some reason you need to do something and you decide it's okay for him to stay for awhile, I will personally, myself, if there is anything, I will bring him home to you personally, to make sure he's right at home and walks in that door, if there is something you need to do. That's no problem, and I've got a card, if you need to check and find out what's going on during that time or anything you can say, "Hey, is everything okay?" "Do you want to come home?" or anything like that, you can feel free to contact me and I'll put him right on the phone, so you can discuss anything. I'm trying to make it easy on you. I know you've got things to do.

MS. NOVAK: I know. I know.

DET. HOFFMAN: See, it's almost been an hour and

I'm still into Monday, and this is what we did the other day. We went through this thing, and you see what I'm driving at. I'm trying to collect his complete memory about if he saw anybody strange or anything. This is so important to me, and he knows I've asked him a few sensitive areas , friends, what they may have been doing, their activities, and some of the kids, just as I said, this one kid would not tell me, and I've interviewed some of his friends and I'm getting into a real sensitive area, to ask him some questions about does he know the fact that his friend, their behavior, what they do, certain things that they do. They may have some vices in life, so to speak.

MS. NOVAK: I'm sure a lot of them do.

DET. HOFFMAN: And sometimes they don't want to say this, and this is what I've gotten a problem with other kids, and I had to talk to the parents as I'm talking now to you, you know, and they felt more comfortable. I had a couple sit in and they felt comfortable when they found out I wasn't going to, "You tell them you did something here and now."

I don't interview people like that and he knows that. He knows I won't touch this young man. I don't yell at this young man at all. It's not my style anyway shape or form and I've never done that even when I've had somebody in that I've been accusing of something. That is not my style, and nobody else is going to be in here except for me and him in this interview room. I'm not going to bring anybody else in here to sit in here, just he and I'll let y'all talk for a minute.

MS. NOVAK: No. I'll wait out here in the lobby for you. If you want to talk by yourself,if you think that's okay, then I'll wait. Well, I'll just go out there and wait for you.

SHAWN NOVAK: (Undiscernible.)

MS. NOVAK: You won't freak out or nothing. I'm worried about you freaking out. How did you get to be

the neighborhood busy body? You know everything.

[Det. Hoffman walks Ms. Novak out of the room. Shawn remains in the room alone until Det. Hoffman returns and the interview continued as follows:]

SGT. VANDERHEIDEN: Hey, Shawn, do you want a doughnut?

SHAWN NOVAK: No. No, thank you.

BY DET. HOFFMAN:

Q Okay. All right.

A Could I get an ash tray?

Q An ash tray? Yeah. (Det. Hoffman gets an ash tray for Shawn.)

This chair right here. I'm just going to sit to the side of you a little bit. Are you comfortable?

A Yeah.

Q All right.

A (Undiscernible.)

Q Okay. So Scott's bike is lighter and you see them going towards the woods at this time.

A (Shawn nods head.)

Q And it's sometime after 4:30 p.m. and you're not a hundred percent sure on time.

A Yeah.

Q So we now -- where did you go?

A Back to my court.

Q Okay; you were at Hudson and you now go to Tappan Zee?

A Corning.

Q Corning. I'm sorry.

A (Undiscernible.)

Q Corning Court?

A Yeah.

Q Okay; and what do you do there?

A I think I went over to Becky's for a

little while, before I went to my house.

Q You went to Becky's?

A Yeah.

Q Who is Becky?

A Jimmy's and Mike's little brother and Mike's my little brother's friend.

Q Jimmy-- I'm not familiar with them--and Mike?

A Oh-huh.

Q Okay. Once at Becky's house, all right, I think you told me Becky the other day, didn't you?

A Probably. Yeah, it was Becky.

Q Okay. Now I know where I heard the name Becky. I got you confused with somebody else there for a minute. Somebody said something that they went somewhere. Okay. You're sure you went to Becky's house?

A Well, no, but I go over there about every day, so I probably did. We go there (undiscernible.)

Q What did you do at Becky's house?

A Like I said, I'm not totally sure I went there. Whenever I go over there, we just sit at the table and talk about whatever is going on and what we're going to do.

Q And where would you have been if you weren't at Becky's?

A Possibly over at Andy's house or Don's.

Q All right.

A I usually go over there earlier and--then I go to Becky's because (undiscernible.)

Q All right. Let me ask you this: Would it be fair to say that you were either at Becky's or who? I don't know this person either.

A What I usually do is, I go over to James' house for a little while, as I walked around (undiscernible) the court, and then I usually go over to Don's house after that, and then on my way back towards my house I'll stop at Jim's house again and then I'll usually stop over

at Becky's.

Q What I'm trying to find out is --

A I'm not that sure, you know.

Q Okay. So -- all right. What are you telling me?

A We might smoke a cigarette.

Q Okay. Monday, you know, that's a pretty big day. You see the kids. You've been very helpful on that, what they were doing. Daniel was wearing what? Was he wearing a jacket?

A Yeah.

Q What kind of jacket was that?

A It was brown. They call it a bomber jacket, I think.

Q Uh-huh.

A And it was kind of leather, but--

Q Okay. He was wearing a brown leather jacket?

A He wore it a lot.

Q Okay.

A I don't think it was leather.

Q So this is what I'm saying. You recall that? Now, what I'm trying to figure out is whether you recall that you went after you see them; you went to Tappan Zee Court. We know that. Did you see anybody at that Tappan Zee Court that you knew?

A I went over to James' and Don's and Becky's. I do this all of the time. This is the three main places I hang out at, so I can't be sure, you know. It feels normal for me to be over their house.

Q Okay. So do you see anybody after Monday afternoon?

A Not really.

Q When is the next definite time you're sure of?

A 6:30.

Q Okay?

A I walked in my front door.

Q Okay. So after you see Daniel go to the woods, you're just not sure, right?

A Right.
Q You're not sure where you were at, but you're sure you didn't see anybody you know.
A Yeah.
Q Okay.
A I might have seen a couple of little kids off across the court or something, you know, but that was not anything (undiscernible.)
Q Okay, and the next time you're a hundred percent positive of is at 6:30.
A Yes, walking in the door.
Q 6:30 p.m. in whose home?
A Jimmy and David, my brothers.

Q Okay. You told me the other day that you guys ordered a Pizza around seven, right?
A (Shawn nods head.)
Q Okay.
A He said I wasn't there then. It was from--
Q Domino's?
A Uh-huh. I remember --
Q You paid the guy?
A Yeah.
Q You're in charge of the money, huh?
A Yeah.
Q Okay.
A Mom left us a twenty to buy one because she was at school that day.
Q Okay. You don't go out the rest of the night, right?
A Right.
Q All right. Okay. Let's go to Tuesday a normal day in school, all day in school?
A Not really, because Tuesday morning I had got a call--well, I call her "Mom," Jim's mom.
Q Uh-huh. Young's mom?
A Yeah. I had gone over there and I had asked

him about the helicopter, you know, with the bike. I saw them rescue people.

Q This is when you find out they are missing, right?

A Right, and I'm kind of, you know--

Q You find out from?

A Jimmy; I asked them about it and they said two kids were missing and were missing since Monday. Jim's mom (undiscernible.)

Q Okay. Did you stay in school all day?

A Yeah.

Q Okay; and how did you come home?

A The bus.

Q Okay.

A I rode the bus every day this week, morning and afternoon, except for Friday. I got a ride with Brian because I thought we were going to be getting--I thought I would be getting to Wadsworth before the, with the buses, and I rode with him that day, but we stopped at his house and then got back about (undiscernible.)

Q Okay. So you get home on Tuesday and you get off the bus, right?

A Yes.

Q Okay. Where did you get off the bus at?

A At Tappan Zee -- no, I didn't either. Tuesday I got off at McDonald's to meet John because had heard they were dragging away and I got off there to talk to him and we walked back the way we normally do. We walked the trail.

Q All right. Let me back up just a second. You say you get off at McDonald's about what time?

A It was almost 3:30. We normally get home about 2:30 and--

Q Just before 2:30, right?

A Yeah, because she has to go to (undiscernible) to drop a couple of kids off.

Q So you get off at McDonald's and John Klepper is there?

A Yes.
Q Okay. What do y'all do?
A We walked back by the trail.
Q Okay. Behind McDonald's or
A To get up to the main trail.
Q Uh-huh. I mean how did you go? Where did you go? Did you go to Birdneck or --
A About in here.
Q Uh-huh. Well, it's actually on this side, okay? That's 7-Eleven, okay?
A Yeah.
Q This is MCD'S. We'll just mark it that, okay?
A Okay; and we went in there. Do you see what I'm saying?
Q F.O.P? That's about right here, okay?
A Okay. That's cool.
Q Okay.
A We went through the middle piece of woods there.
Q Okay.
A (Undiscernible.)
Q Uh-huh. Alrighty. Up a little hill, and then-- Okay. So you went through here, Treefern.
A All right. Thinking that this is off, I keep thinking that--
Q Okay. Well, the streets have kind of messed you up because I know that's right square in there. I've got an idea where you're saying, but you went through these woods out on to the roads, right?
A Yeah.
Q Okay. And then you see --
A We went down to the lake by the trail and we talked to the officer in the van there.
Q Okay. Right here at Kela?
A Right here is where the van was, right.
Q All right. So the officer in the van?
A We didn't talk to the officer in the van; we went

past that.

Q Okay.

A And one of the officers down there told us to go the way we normally do.

Q And that was up through here between the houses?

A Yeah, and then down the trail.

Q Down the trail.

A We got out of the trail and we got past the tree point and a guy came out of the woods, an officer, and told us if we thought of anything to come tell somebody right away.

Q All right. so

A That's when we went back.

Q Were you and John discussing anything?

A We just talked about what they were doing so far, what we had read in the newspaper, and about the time we got to his house we said we knew where the fort was, we ought to down there and check it out.

Q Okay. What time did you get to his house approximately? Did it take ten, fifteen minutes maybe?

A I'm not sure. We did leave my house before Jimmy got home, so I would say we got out there -- we left my house before three I would say.

Q Okay. So you're speaking in the time frame probably about ten minutes to go to Wadsworth, from McDonald's?

A At McDonald's I had to wait a few minutes, maybe five, for the Votech bus to come by. I put an application in there.

Q We don't have to be real specific. So before three o'clock?

A And then after they got there we went across the road to the holiday store and came back before we walked up.

Q Before three p.m. you get to his house?

A His house and mine, both.

Q Okay. So y'all went to separate houses?
A Yeah, because I went up to my room and I put up my books and changed my shirt.
Q He was at home at this time?
A He was over my house with me.
Q Oh, he was over at your house.
A Uh-huh.
Q And was he in your room with you when you were changing?
A Yeah.
Q Okay. So you changed. All right.
A Changed my shirt.
Q Okay. You changed your shirt and then you guys go where?
A Back up the main trail--
Q Uh-huh.
A --to show him where the forts were in the ground and back to the van.
Q Back at the Police van?
A Yeah.
Q So this is after three, between three and 3:30?
A Probably.
Q Okay. Did you and Shawn you and John Klepper go to the Police van via the trail in the woods?
A And we met Louis at the van.
Q And met Louis at the van.
A Uh-huh,
Q Okay. What did y'all do? Do y'all sign in?
A Yeah.
Q And you talked to Officer--do you recall his name?
A No. I think Louis was joking around and saying--I think he was calling him Pumpkin or something.
Q Okay. So did he assign y'all a task to do?
A He told us if we wanted to go, we can walk up through the woods so we went up to Birdneck Road and started there.

Q Okay. So all three of you walk up to Birdneck Road?

A All of us three to Birdneck Road.

Q Show me here -- we know. Okay. This is Birdneck, right?

A Yes.

Q This is Prosperity?

A All of this is woods.

Q Okay.

A Do you know the little grassy --

Q There is a little parking lot. Okay.

A Well, there is a telephone pole laying across there and you can cross into there. Once you cross that, we went into the woods, down to the one fort that we know.

Q You say you went to a fort in here?

A Yeah.

Q Okay.

A And we all started there and then we split out and walked across the trail, you know, went into the woods, switched places, whatever, and got up there, and they met me at another fort over here. Well, I went over there and told him we had found it. I talked to some lady out there with a little pad.

Q Okay. So you go up--you and Louis and John Klepper, you find this fort, right?

A Well, we knew about the fort.

Q Okay. Well, you knew about the fort, so you looked at the fort. Was anything discussed there? Does Klepper say anything to you or Louis say anything to you?

A All I can think of, we talked pretty much about the whole thing. We kept hollering back and forth at each other, you know, "I'm over at this fort," or, you know, "Don't forget to take that one area," or "There is a big spot here." John wanted to go in the middle, so he had to walk through all the water and kept complaining

about that.

Q Okay.

A I told him, "You picked it, now shut up .

Q So you go up to the -- you walked from here to the main trail, right?

A Yes.

Q Okay; and nothing. You see nothing, nothing unusual?

A Well, we found a new fort.

Q Found a new fort where?

A Pretty much in the middle.

Q Like in here?

A Yeah

Q So let me just mark it "new fort" so we don't get confused. Okay.

A I know from the (undiscernible) along like this?

Q Uh-huh.

A And then (undiscernible) and there is a board here and then a space and cleared only at the beginning of the trail on each end.

Q Uh-huh.

A There was a shovel laying there and some of that green.

Q There was a shovel here?

A Yeah, broken and shovel (undiscernible.) It looked old and rusted.

Q The shovel was rusted?

A Yeah.

Q Okay. So you found a rusty shovel.

A Uh-huh.

Q Between the old fort--did you find that?

A Yeah, I found it because I was at the fort first.

Q Between the old fort and the new fort?

A And the new fort.

Q Before the main trail?

A Yeah.

Q All right.

A I know definitely I could take you to that if I needed to.

Q When y'all get up to the main trail, what do you do?

A We walked up the trail toward a pile of junk that was lying there and we were telling him what we were going to do and they said, well, they wanted to meet me over there. I told them go up and down these dirt hills in that area and I was going to the van and I would meet them back here.

Q Okay. What was your purpose in going to the van?

A To check in with them, and tell them we hadn't found anything and we were going on this side of the trail.

Q Okay. They wanted you to meet them where?

A At a little fort that was right here, down from the lake.

Q All right. At the fort?

A Yeah.

Q I think that's probably where you're talking about, right?

A I don't think so.

Q Is this the one with the canvas on it? Like the canvas up on the top of it or something?

A No.

Q Is this the fort Klepper and those guys were building?

A No. Is that what John told you? He told me one of his reasons why (undiscernible) because he started a for with someone, and they had like little pipes, sticks and stuff right around the fort. He was kind of worried they might have gotten into some of that. He said he had it booby-trapped a little bit.

Q Is that the fort y'all meet at?

A No.

Q Okay.

A It was like, well, (undiscernible.)
Q Where is it located?
A It was right about there.
Q Okay. So we've got a fort and that's about the half the length of the lake, right?
A Yeah, I guess.
Q Is there a trail going to it?
A Do you know how the clearing is, and stuff there?
Q Uh-huh.
A There was a little trail that comes off in the beginning of the woods, but it doesn't get all the way down to it.
Q That's not Klepper's fort though--
A No.
Q -- that he was working on?
A I think Tommy Wines built that.
Q Tommy Wines built that fort?
A Yeah.
Q Where does he live?
A (Undiscernible.) Have you ever talked to him?
Q No, I haven't. I mean, somebody may have.
A I know somebody was there quite a bit, I believe.
Q Okay. So you go back, come up, you meet them at this fort and what do y'all do at that point?
A Spread out and start walking.
Q You spread out and start walking?
A Yes.
Q Who's in front, whose in the middle, and who's behind?
A We pretty much were spread out.
Q Okay. So you were spread this way; you weren't spread in a line?
A Right.
Q Okay. So you're not walking in a line. Did anybody have any idea where these kids might be?
A Not really.
Q Nobody ever said, "Let 's go here, I think they're

here," or "Let's go here, I think they're here."
A No.
Q Nobody said that?
A The idea mainly was to look for forts thinking they might have had one they hid out in.
Q Okay. What I'm saying, nobody said, "Let's go this way, they might be here," or "Let's go this way, they might be here"?
A No.
Q Okay.
A When we got there where they ended up being found--
Q Uh-huh.
A --John was really afraid of snakes and we kind of zigzagged through that, found that and left it because they got tired of walking through swampy stuff.
Q Okay.
A (Undiscernible.)
Q So y'all go from this fort in the woods.
A This tree fort was really elaborate?
Q I'm not sure.
A Well, because I had heard there was one up in the trees that was higher than the rest.
up in the trees that was higher than the rest.
Q Let me ask you this: When you leave this fort, do y'all go to Klepper's fort?
A (The witness shakes head.)
Q Okay. Y'all never go to Klepper's fort, right?
A Not that I know of. I mean, we have gone to it.
Q What is the next noticeable thing that you get into, terrain, is it thick, wet, dry, what?
A Well, in here it got really thick, but it was dry.
Q Okay.
A When we got all wet all through here.
Q Okay. So is it fair to say that this is thick?
A Thick and dry.
Q Okay.

A Lots of vines and thorns and sticker bushes.
Q And show me here. Help me out. You say this area is wet?
A Until you come up to--I guess part of this, but it gets wet and swampy.
Q This is wet and swampy?
A Yeah, and there are some thin places and thick places. Noticeably, there wasn't a lot of big trees.
Q Is there a little road in here?
A Not here. The road comes from the trail and goes to the skate ramp and goes off.
Q Okay. So this is the road.
A And I don't remember ever having walked that before. I mean, when I went up to the skate ramp to try it out, I remember seeing the road, but never went on it.
Q When you guys get to the wet swampy area, what do you do?
A We kind of weaved through it a bit. I was with John. (Undiscernible.) Louis went by himself. He went up the long way and that was where we met. That was just before we met the (undiscernible.)
Q Now, how far, when you stopped, when they left you--
A Uh-huh.
Q --how far was it to where you found the kids?
A I would say we got in there within five minutes.
Q Can you give me an idea as to yardage wise, maybe the length of this room, the length this building. You're familiar with a football field right?
A Uh-huh. It wasn't all that far really. It was pretty thick. It took us longer to walk through that than if it had been open.
Q Are you familiar with a football field?
A Yeah, kind of.
Q Okay. Do you know the distance from goal to goal, a hundred yards, correct?

A Yes.
Q Okay. So keeping that in mind how many *football fields would it be?*
A Maybe one.
Q So a hundred yards or less, okay, not two hundred yards maybe?
A I wouldn't say two hundred yards. I would say less than that.
Q Less than two hundred yards definitely.
A (The witness nods head.)
Q Okay. So less than two hundred yards. You guys were right on top of them then.
A Pretty close, yeah.
Q I guess if you guys had kept going--
A We might have found them. We talked about what we would do if we found them. I said one of them would have to go for it, you know, I didn't want to be--I had said--we had talked about who was going to stay with them and who was going to go get the people to come and find them, you know.
Q Okay.
A And they had talked about, we had talked about ways, you know, they had said I was going to stay with them and they were going to go, but they said they probably couldn't find their way back.
Q Y'all had never discussed how they would be hidden or anything like that.
A No. We had just said that it would have been, hide them in pretty much anywhere on that side of the trail because it was always thick.
Q Well, did somebody say they would be buried?
A No.
Q Or they would have been--
A We had pretty much told the police where we were at to look for fresh graves.
!\Q Louis said, "Let's look for fresh graves." But that's about--it is that fair to say that's as far the discussion

went?

A That's as far as the discussion went.

Q Okay, as far as discussing how they would be found?

A We kept looking at any place the leaves had been picked up, you know, maybe a squirrel had done it or maybe somebody had walked through there.

Q So the only thing said was, Louis, "Look for fresh graves"?

A Yeah.

Q What did he mean? I mean, did he elaborate on that or tell you what he meant?

A I figured he meant where it had been dug up.

Q Okay. You're not talking about open pits or something.

A Right, I don't think. He said it was morbid, but look for fresh graves.

Q Okay. He didn't tell you, go into any detail about it.

A No.

Q Okay. So you meet up with the searchers, right?

A Yeah.

Q And John and Louis, did they leave?

A Yeah.

Q Did you meet with the searchers?

A Yes.

Q Okay. You meet with the searchers less than two hundred yards from where you find them.

A (The witness nods head.)

Q Okay. Less than two hundred yards from where you find them, and John Klepper and Louis Rich, right?

A (The witness nods head.)

Q Leave. Okay. Now, what happens from this point?

A I got really thick and then it got wet and I was walking along, kind of in the water and other people were too pretty much. I wasn't paying much attention,

and on the way back, we were walking pretty much-- we had a group that was pretty much in a line. (Undiscernible.) They were pretty much spread out or whatever. On the way back we tried to pretty much stay out of the water, well, we did. We had been on a big log and (undiscernible.)

Q Okay. So you're walking. Who's in front?
A Directly in front of me?
Q Yes.
A Was
Q Were you walking in a line?
A Yeah. (Undiscernible.)
Q So y'all are walking in a line.
A Yeah, out of the water.
Q A man's in front?
A Yeah.
Q Do you recognize him from the paper?
Q Did you see him in the paper?
A Uh-huh. (Undiscernible.)
Q Was that the same guy?
A I think so.
Q So the same man you saw in the paper?
A Uh-huh.
Q Okay; and a woman in front of you?
A Yeah. I don't know if they were there at that time, but I know they were there within a couple of minutes. There were a couple of black guys on the log behind me and they were the first ones over there. You were behind.
A Yeah.
Q And so you walked up--did you walk a single file on this log?
A (The witness nods head.)
Q And you were still in the same order. What kind of log was that?
A You've got me.
Q Okay. So you're walking on the log, same order,

and what happened?

A I saw the man stop and he was crunched over like this, and they were right there in front of me and a lady started to cry.

Q And you jumped in front of him?

A In front of her.

Q Between them?

A And stepped over the log and I was just about on the kids.

Q And you saw them?

A Uh-huh. I was, (undiscernible) with that kid, I mean.

Q Did you touch his hand or anything?

A I -- (indicating).

Q But you didn't touch him.

A No.

Q Okay; and they are pretty well covered up, right?

A Yeah.

Q So I mean, even when I got there I couldn't -- I had to move a lot of stuff, number one, to recognize them; number two, to see,how they were laying and everything. So I had to move that just to see how they were laying. I couldn't tell whether it was one person or two at that time, you know. I had to really look and look. Did you really look at them or was it just "uh-oh" and then back off?

A He was right in my face.

Q Yeah, but--

A I mean, I couldn't make it out that good. I couldn't have told you that, you know, the way they were laying.

Q Could you tell it was two people or you didn't know?

A I'm pretty sure, because I mean--

Q Okay. I mean, certainly you couldn't tell which way they were laying or anything because I couldn't even do that. Right?

A (Undiscernible.) The head covered up and Daniel was just like next to, long, and a hand was right here.

Q I know the other boy was covered. I had a heck of a time. I mean, I couldn't even tell which way he was laying.

A I thought--I was thinking they were both dead because, you know, I thought I saw a shoe and

Q Uh-huh. So you had met with his shoe.

A Uh-huh, or it could have been his, so I figured the other kid was laying like this, after I thought about it later, but I stepped -- he was right here, he was right here, facing this way.

Q This is just a guess though, right?

A Yeah,. and I jumped around here like this, and I was right here crouched down.

Q Okay.

A And my head.

Q So that was just a guess.

A Yes. it's hard to be accurate.

Q We aren't worried about that.

A It's a guess. A close guess.

Q Will you initial that? Just a guess. Initial that.

A (Shawn complies.)

Q Okay. So at that time this happened, who comes up next?

A Right then? It was about at the same time. The guys behind me, they could have been there before though, and what I really noticed was the SWAT guys that came out from this side and it was so thick until you got right there, you could see them, right beside them.

Q Okay. The SWAT guys came up?

A Uh-huh. They had SWAT on their shoulder, I believe.

Q Okay. All right. So they come up. They take over basically?

A Yes, telling everyone but the police to get out.

Q Okay; and you leave which way?

A With the group. They told us to head out this way.

Q So you leave with the group?

A Yes, come out of the woods as a group, split up on the road. They walked the road for a little bit before it got flooded and then they went through the woods. Somebody said something about woods, which would have been (undiscernible) and I kept following the road until it was clear and come out about the same place anyway.

Q Where did you come out when you eventually came to a road or a street?

A A street?

Q Uh-huh.

A Well, when I came up the trail where I told you the two big trees were?

Q Uh-huh.

A We walked through it and I looked down and I walked down that way and it was Treefern. Treefern. This is where you saw this kid and you said something about trail worms?

A I saw several kids.

Q Okay; and at that time then you go--where do you go from there?

A Up toward where the street and I told them the officer there that everyone was out and I left.

Q Okay; and did you go home then?

A Yeah.

Q Okay. Did you talk to anybody?

A No. I walked past where all of the news people were and set up (undiscernible) the people or what, but I was told not to get in there and I walked up the trail.

Q So after you find them, then you go to Tappan Zee--

A Uh-uh. Treefern.

Q Treefern, right?

A Yeah.
Q Okay. Treefern and
A (Undiscernible.)
Q Okay; and you see a kid about trail worms.
A Yes, which you interviewed.
Q You tell the officer, if they come up one short, you're okay.
A Yes.
Q That's you.
A Yeah.
Q Okay; and then you go back to Wadsworth, right?
A Yeah; and that's the last time I went on the trail.
Q Okay; and do you go right home?
A I went to James Young's house.
Q Okay.
A For a few minutes, and told him we found them and they got a call there for Don. He said he had to go home, and Don told them that I found them and his mom wanted to talk to me, so I went over there to see her. On the way back, I stopped off at Jim's house again, I think, and then I went to Becky's.
Q All right. Okay. I'll tell you what. Why don't we take a little bit of a break again since we just discussed that and let's walk out and say "hi" to Mom for a minute so she thinks you're okay, all right? Do you want another drink? Do you have any drink left? You want more? Do you want another one?
A No.
Q Okay. We'll get a drink of water or something on the way back or whatever, okay?
A Okay.
Q All right. Let's just say "hill to Mom so we won't be upset and nervous and everything and then we'll continue on.
Do you want a doughnut?
A No.

[Whereupon a recess was taken, after which the interview continued as follows:]

BY DET. HOFFMAN:
Okay-

A I told her nothing was going on.
Q Alrighty. okay. So we're at the end of Tuesday right.
A Yeah.
Q Okay. You know, I had basically talked to a lot of folks, as I had told you the other day I talked to. Of course, now I've talked to a ton more of people and everything. Of course, certain people tell me certain things, you know, and you hear rumors there. Well, now I need to try to dispel some of the things to try to find logical answers for some of these things, and this is what I want to go over with you, and you don't have a problem with me going over anything with you, do you?
A No.
Q Okay. one of the things was, that I curious about, and there was a mention by several people, and either by this guy McKenzie, because he wasn't sure, or by the way, he said, you know, these guys, we know you were there. We know you checked into the van. There was some confusion over that the other day, so I know you're telling me the truth on that. You know, but--
A But now McKenzie is saying it was not true?
Q Well, I think it was kind of a shock to him. I think it was kind of a shock to him, okay?
A That's what I was thinking.
Q But I've been able to verify you were there. I know you were there, okay?
A I was told they said I was not there.
A Okay. Well, you know, I've been able to dispel that. This is why we go back over these things. This is why, now, though I need to clarify some things that

certainly I've found out. Okay?

There is a key point in something, and let me bring it to your attention. You're a smart guy. You're no dummy, right? You know, you know, you know, I don't think I'm going to sit in here and try to trick you on something. I'm sure you mentioned something the other day about your teacher, and these guys might play a word game with you.

A I don't think so.

Q And you don't find me in here trying to trick you, so you know that everything that I've been telling you so far, that's been truthful, and I continue to tell you truthful matters of what I've found out, and everything that we discussed the other day and so far today. I asked you one or two questions the other day, and it had me curious, and we were able to explain those and that left out the curious, you know, the curiosity part of it. It dispelled anything that led me to believe that why isn't he telling me the truth on this or something. Right?

A Yeah.

Q Okay. So you know I've been truthful with you.

A (The witness nods head.)

Q There is something, usually, when we sit in here and talk and everything like that, the other day I had you draw and hold my book and everything.

A Uh-huh.

Q All right. Well, sometimes we take fingerprints from people, like the class and word trick, okay?

A Uh-huh.

Q Well, this is just a technique that we, use, okay? Well what I did, I lifted your finger prints and I lifted many other finger prints that I had the same thing. I'm not doing that today. I've already got them. All right. Something that was really curious that came up, and this is why we need to go into this and I need for you to think and I don't want you to think I'm tricking you, but

there was something really curious that came up and I think it can be explained, and I think I know what happened and I think probably at that time frame, you'll probably remember it now that we're talking about it, and you're probably going say, "Yes, it did happen. I just didn't realize it the other day; now I remember."'

A Uh-huh.

Q Of course, what we did, we have technology called laser finger printing, that we do on clothes, so that it gives us finger prints, and the other day I talked to this McKenzie guy and he said he can't remember you being there, he can't remember you saying something about a snake, so I asked Mr. McKenzie--

A (Undiscernible.)

Q I think, you know, I think he just blanked out and this is why I couldn't rely on him to tell me this because if he remembered everything, he probably would have remembered something. You said you almost touched -- which one? Daniel?

A (The witness nods head.)

Q Daniel; okay. A curious point came up in there. There is nothing on his hand or anything like that. Do you know what I'm saying? But on the jacket there was a print. Now, what I'm thinking is,possibility, that maybe you reached down and touched the side of his jacket and then jumped back.

A I may have. I mean I freaked out.

Q What I'm saying is, try to remember. You see, we're trying to dispel everything, you know, saying okay, there is a logical explanation for this. Okay. Nobody else's was on there except for that one of yours.

A Okay. I was walking along and I may have.

Q Okay. What I'm going to -- take a second. I know you did, okay. Okay. Okay. Remember, did you touch his jacket, maybe just for a second? I mean, not grab it, do you know what I'm saying, but touched his jacket and then pulled your hand back. Just think

clearly.

A I probably did, yeah.

Q Okay. I don't want to keep hounding on you, you understand. I don't want to say if you did, you know. I'm not trying to force you into saying you did or you didn't. All right?

A I think I probably did if my print is on it.

Q Well, what I'm asking you, think a second; think for a minute and then think back. I know this is terrible. I know it was terrible for yo and, you know, I don't want to get into that, but I know it was terrible, but just think, you reached down, there is a possibility, okay. You know there was a possibility, but just think, did you touch his jacket? See, we can explain things. We can then explain how that got there. Do you know what I'm saying? Think for a minute.

A I definitely did, yeah. I distinctly remember touching his jacket.

Q The reason why I asked you, 'cause, somebody came in and told me you definitely touched his hand, that you told him that. Well, I'm not concerned with that, okay? Do you know what I'm saying?

A Yeah.

Q But what I am concerned about is you know, you say, well, no, I didn't touch his jacket, or no, you know, I would have a problem, do you understand that? So what I'm trying to do is, okay, it's a traumatic experience. You remember jumping over the log; you remember stooping down. You showed me. At some point there has to be, either you had contact or you didn't have contact, and it had to be touch like this (indicating.) It didn't have to be something like that or anything, but it had to be an actual touch where you had--a little bit of pressure had to be applied, not squeezed, just enough to leave that there.

A A little bit like that?

Q Yeah, it would be something like that.You don't--

I mean, it's not like--okay--

A That would leave a print, right?

Q Yeah, uh-huh. So thinking, did you touch his jacket?

A I don't remember. I honesty can't tell you.

Q But it's a possibility?

A Yeah.

Q Okay. All right. How about I know these guys were laying together also, and it makes for a possibility--

A Can I ask a question.

Q Certainly.

A The way they were laying, because I've read two different ways in the paper, and what I thought I saw is different from even that. I thought one was laying like this and one was like this and the paper said they were side-by-side, and then that they were stacked. I was curious about how they actually were--

Q I'm not at liberty to comment on that. I'm not hiding anything from you, okay, but you know, I have other people to talk to too and I don't need any speculating on how things are getting out. I certainly don't mean to cut you short. Do you understand?

A Yes.

Q Okay. So, there is a possibility that Daniel is touched, okay; and again you know, and I know these kids are close. You told me they are close with each other, okay. Now, I know that you, it was a traumatic experience and everything like that. Also on Scott there was a place on the back of his sweat shirt, all right, and it was right like here, and I believe it was this finger or something like that, three-quarters of that finger, but it is definitely yours, and I was trying to think okay, well maybe you went down and you gave it one of those, but your dispelling all of these things, You know, I'm saying, okay. There is an explanation for this. The same thing if I had found McKenzie's print on his, on the kid's shirt, I would be asking him the same thing. Okay.

Why is it there? If he had told he, "I'm a hundred percent sure I didn't touch him," then, you know, I have a problem.

A I don't believe either one of them at all. I think they both were standing the whole time.

Q Yeah, they were, but like I said--

A (Undiscernible.)

Q Okay. Like I said, remember now, he can't remember, he can't remember that you were actually there, right?

A Uh-huh.

Q He doesn't know you were actually there, and so he can't tell me what happened. His wife can't tell me what happened. They can't even remember if you were there or not, so the only thing I have to rely on is you at this period of time. SWAT guys remember seeing you when they came up, so I know you were there, you know, but I'm trying to think okay, you know, you've got one here and we've got three quarters of one here, both of them yours, so it must have been that they were touched, but -- listen, it's not a squeeze. Do you understand what I'm saying?

It's not a squeeze on there or anything like that. There is nothing, bruises or anything like that, you know, where I'm telling you touched, I promise you that, but it's just, you know, it can be as light as that, but that's all it takes, just a touch. The same thing, you touch this, you touch that, I can get it. See, you know that. You know that. I know you're not dumb. You know, that's it. You know, you touch glass just like that, you know, you leave it and you can see it.

Okay. So I've got one on Daniel, and we've pretty much ruled out, okay, there is a good possibility of that, and one on Scott on the back side right there, and I don't want to scare you or anything like that, but it's right there on the side, like on his shirt, so now I'm trying to think, okay, this one too must have been, you

know, I don't know, when you went down, or what happened, and that's why I have to rely on you. I have to rely and say, okay, well it must have been because-- otherwise I would have a problem. You know, if you said, "It wasn't mine," and, "I definitely didn't do that," you know. I would think you were hiding something from me, which I don't believe. So think for a second about the other one. I know you couldn't probably tell who he was, okay, but think for a second.

A On Daniel I could.

Q You definitely could have touched Daniel on his side.

A (Undiscernible.) I mean, I was right down there, you know.

Q Well, I know. I'm just trying to let you know what I'm thinking. Do you know what I'm saying?

A Yeah.

Q I'm trying to let you know what I'm thinking so you don't sit here and think, "Okay, well he's trying to trick me or something." You know, I'm telling you, I've got a problem. Both of them have been cut, and if you said, "No, I didn't," we would have a problem. Do you know what I'm saying?

A Uh-huh.

Q So what I need you to do is take a second to relax and think, and I know it's traumatic, but I know you were down there. You told me. These guys, I can't rely on the McKenzies. I can't rely on them. They don't even know you were there. The SWAT guys tell me, "Yeah, he was there. we know he was there. We came UP there and then when we came up there we saw him," okay? So we're okay. I know you were there, so I know that you were here, and there is an explanation for that.

Now, what is that explanation? You know, either you did or you didn't, so take a second and just think for a minute and try to remember. I know you don't like to

think of it. Okay? I know you don't like to remember that. I don't like to go over it--and try to think, okay, yeah, I probably touched one of them, I touched this one, but I only touched that one.

A I'm not sure, you know? I mean--

Q They weren't that covered. (Undiscernible.)

A (Undiscernible.) I may have even got down there and switched, you know, but I don't know. I know I crouched down. I'm positive. I obviously did, you know. I can't say. I don't know. I don't know.

Q Okay. There is a probability that you did?

A Uh-huh.

Q All right. Are you almost definitely sure you did?

A I almost, I'm positive I did, but --

Q You're positive you did.

A If there was a print there, I had to have. I don't actually remember doing it, you know.

Q Okay. Is it more that you don't remember, or you do to a point, but you're not a hundred percent sure you actually did? Is it more like I probably definitely did, or I probably definitely didn't?

A I probably definitely did.

Q Okay. All right. Okay. Now, okay.We've got this taken care of, right?

A Uh-huh.

Q Okay. We go into now, the last time you saw these guys was at Wadsworth, right, going into the woods and that's the last place you saw them.

A (Undiscernible.)

Q Okay. All right. Do you remember the other day when I said something to you about what if I were to tell you somebody told me that they saw you with the kids; do you remember that the other day, and then you said, naw, there is no way, no way and everything like that? Okay. Most of the time when I ask you these questions, I know the answer to something.

Now, we have something else we have to explain, and

this is very important, where we're going with this, and I want to ask you to try to recall, you know, what exactly happened. It takes a lot of power because it's a traumatic experience, right, and it takes you to muster this thing up. Okay?

I knew the answer to that question, all right; and in my investigation I also found several other things that some people have told me, and I think you know what I'm driving at and I think you know it's coming from Klepper, and I know in school, and I know that there is a teacher that overheard partially something, and I think you didn't want to say anything because you just, you were nervous. I don't blame you. Right? Okay. I don't blame you, but I already knew the answer to that, and when Klepper verified something, and now I'm a hundred percent sure now of one thing.

I know you were the last to see the kids. I know you were the last to see them next to the edge of the lake walking down the path, and I know that because John Klepper has told me that you told him at school not to say anything. "Now don't say anything, but I was the last to see the kids alive," and they were alive when you saw them.

A Uh-huh.

Q They were alive. You don't have to say anything about that now. They were alive. And that they--I went into the woods behind them and I was going to the 7-Eleven and I saw their bikes as I passed near the brush pile, and then I went to the 7-Eleven, I got something to drink, I think you told me Pepsi or something, and I came back and I saw their bikes and I went back to Wadsworth. What he is telling me, you said this. Okay?

Coupled with the fact the young man stepped forward, and what I did is, we took your picture and put it in with several others and showed it to this young man. He said, "Definitely this is the guy that I saw walking along the edge of the lake with the kids, not in the

woods, but towards the woods," okay? So he has verified that.

Now, I'm thinking probably maybe you didn't want to tell me that because maybe I would think something different. Well, I know now that John, he told me that they were alive. You said "alive." You didn't say -- you said "alive," so I know that was you. Now, I've got to dispel that and everything. I know myself, these two people, okay, that that was said and done and what I would like to ask you is for an explanation.

Was it because you were nervous or scared or think I might say something about you?

A No. I walked up to 7-Eleven by the road. I know I did because I was behind Jimmy at the counter.

Q But listen.

A I said I wasn't sure about coming back by the trail.

Q Okay. Okay. So you said you weren't sure. We left that unclear. That's right. You're right. I takethat back. Okay. So when you come--now I know, now you've got to get your thoughts together, which I'm sure you recall your memory now. What I'm saying is, what I'm saying to you now is, now I know I have a kid -- remember when I told you what if I told you--

A Yeah.

Q --this kid told me this? Well, it's not a kid. It's a teenager, a responsible teenager. Okay? And they have told me -- they picked you out. "This was definitely the guy that I saw that was walking along the edge of the lake with the kids." He didn't say you were doing anything. He said, but they were headed like towards the skate ramp, the old skate ramp, and those, the forts that you described to me, the old ones, the old ones like Klepper's and everything?

He didn't say you were in the woods. He said you were walking along the edge of the lake and it looked like y'all were just talking, and Klepper has told me that

you came to him and told him, and the teacher has even talked, bits and pieces of it, about that, so I was wondering okay, this is why I got you back and I said, you know, I need to talk to you again and say okay. We need to get finger prints taken care of. We need to dispel this. We need to say okay, now, you can recall it, because if you told me, "No, no," I have a problem, okay?

A Uh-huh.

Q Two or three people don't tell me lies; do you know what I mean?

A Yeah.

Q So now I need you to recall this, and this is not a problem or anything. I know you've got to recall that. I mean I know you know and maybe *You* -- and this is why I ask you, maybe You were nervous to tell me that. Maybe You had forgot it at that time to tell me that, but now we ne ed to know.

A I can definitely say I walked up there by the road.

Q Okay.

A I can't say whether I walked back by the trail or not.

Q Okay, but you can definitely tell me yeah, you did walk with them a portion of the way.

A No, I don't remember seeing them boys right there. That's what I'm saying, if there had been, I would have recognized them.

Q Shawn, listen. Okay? You've got to recall something. Okay? We've got a problem, if you don't. If you can't remember these things, a problem arises. I have a teacher, I have someone who has stepped forward, which I already knew about, and I've got John Klepper telling me you said this to him. You have to remember your conversation with John Klepper. He remembers exactly when it was. It was after second bell at 9:25 a.m. one morning. He tells me, the teacher, and I've talked to the teacher. So, I know that took place,

and do you remember the conversation telling him that? Do You remember telling him that?

A Not that I had seen the kids.

Q Well, this isn't what is said.

A I do remember telling him I was going up there.

Q Well, okay. He recalls everything and committed it to memory. Okay. Now, what I need you to do is to recall what you told him, and you have to realize, I'm not trying to trick You, do you understand me?

A Yes

Q I've laid it out straight to you, you know that.

A Yeah.

Q I 'm telling you that he has said this and he's told me this. I'm telling you the other day, and you know, because I said, "what if." You knew that I already knew something, and I was trying to figure it out on your part. All right. Now, I know all of the answers, but I have to come to you and say, "Okay, Shawn, listen. Let's think about this and get that out of the way." You did have a conversation with him. He told me you had a conversation with him.

A I talk with him every morning.

Q You told me now that you definitely went up to 7-Eleven after they went into the woods. You can recall--

A That was before I saw them.

Q Well, he's telling me different. There is somebody else that's saying they saw you over at this location and this is what's bothering me. if this isn't so, then I have a real problem. Somebody is not telling me the truth. I don't think--you don't have anything to hide from me, do you?

A No.

Q Okay. Then we don't have a problem each other. We can explain this. We can explain If it can't be explained then it's hiding something from me.

A I'm not hiding anything.

Q You're either hiding something from me or you're not.

A I'm not hiding anything.

Q Okay. Then you need to muster up the courage and everything, because I know you're nervous, you know, you know, you mentioned something to Klepper about, "Well, they may suspect something." I think anything. You understand? I don't think anything about you unless there is a problem about I can't explain why these people are telling me this. Then there is a possibility I may think something of you, but at the time, I don't think anything of you.

I think we've explained everything so far, but we have to explain this, and it has to be positive. It can't be a "maybe" or "I think so" or "probably."

A Almost everything has been a "maybe."

Q Yeah, well, this can't be because you know in your heart and in your mind what you walked to and where you went to and remembered last seeing them, and I know already the answer to that, because I know inside now, I think there is a little bit of fear to tell me this, that I will think you hid something from me. I don't-

A I'm not afraid you're saying anything.

Q Okay. Listen. Look at it from my standpoint,okay?

A Okay.

Q All right. Here we are. I'm sitting here and I'm investigating this case and I'm going, "Okay. Who did this? Why did they do this?" Okay; and then I turn around and I get some information, seeing these guys, and I get this information, and I talk to you and I told you the other day, what if I told you somebody had stepped forward and said that you were last seen with the kids walking near the edge of the lake?

A Uh-huh.

Q The kids were found in the woods, all right, not on the edge of the lake.

A Uh-huh.

Q Do you understand?

A Yes.

Q And you said, "No way. No way. No way." Okay. So I thought. Well. I don't know. I'll give him the benefit of the doubt at this time. This one person. Talking to John Klepper, he tells me well, I don't want to say this. Shawn's my friend. He told me not to say this and I don't want you to get upset or think bad of him. James says, Okay. Shawn tells me, he's been (undiscernible) 9:25 the second bell, I remember it, it just kind of bothers me that he was the last one to see the kids alive and that when they went into the woods he went behind them and walked to the 7-Eleven, and when he walked to 7-Eleven he saw their bikes, and he said he didn't see them. Okay? So John is saying you didn't see them and so do I.

Remember this. He's not trying to put anything on you, and then he told me on the way back from 7-Eleven he saw their bikes there again and he didn't see them. They were gone. Okay? I've got an individual telling me that he saw you with the kids, but you were just walking along the edge of the lake towards the wooded area, but you weren't in the wooded area. He's not putting you in the wooded area. He's not saying you did something. Okay?

I've got the teacher saying, I heard a piece of the conversation. Yes, I heard him say this to John Klepper, and as a matter of fact, I turned and said something to them. Do you recall this teacher turning and saying something to you?

A What teacher?

Q It's a history teacher. That's a belated point. That's a belated point.

A (Undiscernible.)

Q It's no big deal, but listen. Listen. So then I think, okay. Today Shawn and I are talking. Shawn tells me this, but maybe Shawn was a little bit fearful because he told John Klepper, maybe they are going to think something if I tell them this now. I'm not thinking anything. I'm not thinking anything. The only thing I'm thinking is I've got to take care of this problem right here because you're either hiding something or you're not; and I don't believe you're hiding something except maybe you're scared to tell me that, which is no problem. You can tell me that. I'm not going to think anything of it, okay? But I need to know that because if not, then I think you're hiding something about that point.

A Well, I'm not hiding anything. I know exactly what you're saying, but I do recall going up there by the road. That is a definite. On the way back, that's when I wasn't sure.

Q Okay.

A I may have been--

Q All right. Let me ask you--

A Maybe he was mixed up that I was talking --

Q No, he wasn't mixed up.

A I definitely don't remember talking to him about hiding something or--

Q No. He didn't say "hide" anything.

A What did he tell you?

Q He said you told him this and don't tell anybody else. Now, I need you to research your head a little bit. Is it a probability yeah, you did see them again and yeah, You were walking with them, but just for a brief time and then you went back to Wadsworth? If there is a possibility of that, we're okay.

A I have no reason not to tell you if I had been, it's just that I don't want to say it and have something come up, because I don't remember it.

Q Something is not coming up, but listen.

Something is not coming up. The only thing that's coming up is that (undiscernible) problems.

A I remember it. That's why I don't want to say anything. I don't remember coming back.

Q Shawn, listen. Listen. Do you hear what telling you?

A Yeah.

Q I'm not tricking you, son, because you know dagone well, you told Shawn this-I mean John this.

A I don't remember telling John that.

Q Listen to me. Well, he said yes a hundred percent,and this leads me to the point of something is wrong. Something is wrong. You're not telling me something, because I've got a teacher verifying it and I've got another person verifying it,
so three people don't make up a story. One of them doesn't even know you. One of then doesn't know who you are --

A Uh-huh.

Q --but did see you, so I have a problem. Put yourself in my shoes. We've got a problem. Okay. We can dispel the fingerprints, right?

A Uh-huh.

Q We have an explanation for that.

A (The witness nods head.)

Q Right?

A Yeah.

Q Okay. Now, we've got to dispel this problem. Now, either it was or it wasn't. You know in your heart that you talked to John Klepper, and John Klepper is telling me exactly what you said verbatim. He said -- now, it presents me with a big problem, especially coupled with an individual seeing you, and now I've got you, our last person to see them alive and I certainly hope you told me you saw them alive and I hope certainly you tell me, yeah, I did see them near the lake. Maybe I'm nervous. I don't want you to think anything

bad, but okay, okay, you know. I'm not -- I didn't do anything, okay? You've, everything, you've been truthful on that. You've got to do that. If you don't do that, you know, what would I think? What would you think? You would think that I had a problem, you know.

A I know what you're saying and--

Q I'm not saying you're a suspect, okay? Let's get that out of the way.

A That's scary. I know what you're saying and --

Q You don't think that I think you're a suspect.

A No.

Q Okay.

A I'm not trying to hide anything, and I mean, I'll be glad to tell you as soon as I remember definitely, but like I said, I'm not sure. I know they were definitely on the road there.

Q Okay. So you're unsure if you saw, you walked with.them near the edge of the lake and then went back.in Wadsworth. Would it be fair to say that?

A I'm not even sure about that.

Q Okay. You're unsure. You're not sure if that --

A I'm not even sure I went back by the trail.

Q All right. Listen. Would it be fair to say that you're not sure whether you were walking with them or not?

A I maybe have for a minute. Like I say, I'm not even sure I went back by the trail.

Q All right. So you get--all right. Okay. We're clearing that out of the way. Do you see what we're doing?

A I see.

Q Yeah. Okay. So you say you guess you may have walked with them for a minute, but you didn't walk into the woods with them, did you?

A No. (Undiscernible.)

Q Okay. That's what I'm saying. You didn't walk

through the woods with them.

A No.

Q Okay; but you said, "I guess I may have walked with them for a minute." I'm not playing word games with you, okay? Don't think I am. Don't look at me like I'm trying to trick you or play word games with you. I'm not. See, I'm telling you up front, see? You know, because I saw you look at me like, "Oh, you're trying to trick me." I'm not trying to trick you, son. You know I'm not.

A I haven't even had to think about this for some time.

Q All right. You said, "I guess I may have walked with them for a minute." Okay?

A I honestly don't remember having done it.

Q So there is a possibility that you could have walked with them for a minute and then went back home, but you are positive you didn't go into the woods with them, right?

A Yeah, because I didn't have time to do it.

Q If you did walk with them, you just walked along the edge of the lake towards that area, but you didn't go in the woods, correct?

A If I had walked with them, I would have to say I walked with them only they were walking along the lake.

Q Okay. Would it be fair to say it's a probability you did?

[There was a knock at the door.]

DET. HOFFMAN: Yes? Did somebody knock?

SHAWN NOVAK: I think so.

OUTSIDE VOICE: Do you have a minute? You have a phone call.

DET. HOFFMAN: Okay.

Are you okay?

SHAWN NOVAK: Yeah, man.

(whereupon a recess was taken, after which the interview continued as follows:]

BY DET. HOFFMAN:

Q Are you okay, bud?

A Yeah.

Q All right.

A I just wish I could remember it for sure, you know?

Q That's fine. That's no problem.

A I am thinking back.

Q Well, try and understand, that's no problem, okay? The things we would have discussed this morning, okay?

A It could have been.

Q Could have been--it's a possibility you could have walked with them for just a minute, right? It wouldn't have been any longer than that and it definitely wouldn't have been in the woods.

A No.

Q It would have definitely been near the lake and that's it.

A I saw them hanging out up there on the hill, (undiscernible.)

Q Okay. I understand that. Okay?

A Because I have brothers that hang out in there.

Q Okay. I understand. Well--let's move on and get away from that.

A That's cool.

Q You know, we don't want to keep hammering on that, we've got a possibility you could have--

A Uh-huh. If I could definitely remember anything, I'll call you.

Q Well, if you think about it while we're sitting here and it comes to light, just tell me and then I'll know everything's okay. All right.

Now, when I was talking to John, he told me some

other things, okay, that kind of stuck with me, and even Louis verified certain things and I would like to run these by you and just see, you know. Louis and John Klepper were telling me that while you first came to the first fort off of Birdneck Road--

A Right.

Q And this made them unsure of something. You said to them, "When we find" -- I'm sorry. Let me quote you exactly what he said. "When we find them, it will be near a hole and they will be covered with branches." What did you mean by that?

A I don't remember saying exactly that. I mean, we had talked about, you know, if we had done something, what we would do, like how it would look. The easiest way to hide them would be to put them in one of them holes, I guess, where it didn't fall in the water or whatever. (Undiscernible) and covered up.

Q Bring that point that you brought that up, you also said, both of them said that while y'all were walking in the woods, in the swamp area, you pointed over and said, "If I had killed them, I would have put them over there in the thick stuff and covered them with limbs."

A I did say I would put them in the swampy part, because first off, I mean, if you're casually walking through the woods, you can't cover something like that. I mean, and if I had have done that, that's where I would have put them. I mean, what would you do, you know. You would hide them. if you were going to do something like that--

Q It wouldn't cross my mind.

A Well, it did to me.

Q You didn't know these guys were dead.

A No. I wasn't sure at all.

Q Did you know these guys were dead?

A I had no idea. I mean, I was kind of thinking, because they had been gone for a while. I was hoping they wouldn't have been.

Q You also told John when y'all got off the bus and everything, y'all went through that trail that you showed me at McDonald's and everything, and he said while y'all were walking along that trail, you told him, "Whoever killed the kids must have been really sick."

A (The witness nods head.)

Q What did you mean by that?

A You know, I would assume that they would have been sick. I didn't say that --

Q Let me ask you this: Do you think they were killed accidentally, somebody went too far?

A It could have been.

Q Is that your feeling?

A I'm hoping that it would have been something like that. But no way to tell, you know. I would hope that they didn't plan to do something like that. Do you remember a little bit ago that I was talking to you about what we had. Okay. There was a police officer who was standing over on the edge of the log. Do you know how they do that?

A Uh-huh.

Q He saw you with the people, all right?

A Uh-huh.

Q He was standing near the log and he said you got there so fast, that's because he saw y'all. He was watching you the entire time. He saw McKenzie kind of look down and he saw his wife and he said something and he said something and whatever he said he didn't hear, but he heard her scream and he was watching. He saw you move around and look and he said you didn't touch anything, you didn't get close to anything at all.

He's telling me this is what he saw, so and here we have one more thing. I am thinking there is a possibility --

A (Undiscernible.)

Q --there is a possibility, that maybe you found these guys before the searchers did--wait a minute--before the

searchers, and maybe you were thinking that somebody was going to try to pin something on you and you covered them and left, and this is the only possibility that I can think of that happened, because I know that you didn't know that the policeman was watching you. I know that for a fact, so they were touched and they were touched and several hours earlier in time, not Tuesday, so you figure on Monday evening sometime. I'm thinking there is a possibility maybe you got scared somebody was going to blame you for something and I can understand you being that scared.

A (No response.)

Q Shawn, is that what happened? You can tell me.

A (No Response.)

Q (Undiscernible.) I'm here for you, Shawn. I'm here to help you.

A (Shawn smokes a cigarette.)

Q Is that what occurred? Talk to me. I'm here for you. Shawn, is that what happened? You can tell me.

A I was walking back down the path and I told Jimmy that I was going to the ramp, and I had gone up there by the trail along the woods. I had seen the bikes -- I hadn't really thought about though. I had seen the bikes and then that's when I got the idea, that they were playing near there, and I didn't see anybody I knew, and the boys, I saw them laying on the ground.

Q You found them?

A Yeah, and then I picked them up and put them near the log. I found some branches there, that I would cover them with and so nobody would ever find them. If nobody found them, I was going to trip and find them.

Q This was Monday evening?

A Yeah.

Q What did you use to cut the branches?

A (Undiscernible.) I hadn't cut anything. I was just walking around and I picked up.

Q Shawn, I know you cut the branches. I know that

you cut them and covered them. Isn't that true?
A Yeah. They had been on the ground, were on the ground. I walk by. Monday.
Q Shawn. You can talk to me. Don't be afraid. Get it out. Don't be afraid. Something happened and you went too far? Is this something that just happened?
A Yeah.
Q You killed them, didn't you?
A (No audible response. Shawn nods his head in the affirmative.)
Q You killed Scott and Daniel?
A Yes.
Q Okay. Shawn, do you want to talk about it? Huh?

[There was a knock at the door.)

DET. HOFFMAN: I'll be back in a minute.

[Whereupon a recess was taken. Shawn is left in the room alone and is crying. After the recess Det. Hoffman returns to the room and the interview continues as follows:]

BY DET. HOFFMAN:
Q Shawn, are you okay?
A Yeah.
Q I need to read something to you.
You have the right to remain silent. Anything you say can and will be used against you in court. You have a right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements.
Do you understand these things that I just told you?
A (Shawn nods head.)

Q Check here.
A (Shawn complies.)
Q Having these rights in mind, would you like to talk to me?
A (The witness nods head.)
Q Check here.
A (Shawn complies.)
Q Sign your name for me right here.
A (Shawn complies.)
Q Do you want me to tell her or do you want me to wait?
A Let her know.
Q Do you want me to have somebody tell her?
A (No audible response.)
Q Shawn, are you okay?
A (Shawn nods head in the affirmative.)
Q What did you use to kill them?
A (Undiscernible.) It's a buck knife with a bone handle.
Q How long is it?
A (Shawn indicates four or five inches)
Q Is it a lock blade?
A No, a straight blade.
Q (Undiscernible.) Is this the knife you used to cut the saplings?
A Yeah.
Q Shawn? How did you get them back there?
A We were walking around and I--and we were going throughout the woods talking and stuff and (undiscernible) Daniel kept bugging me about wanting to see my knife. I had it on my side (indicating to his right side) and I told Scott to turn around and I looked up and Daniel had got out my knife and I freaked out.
Q Did you take the knife away from him?
A Yeah.
Q Did you cut Daniel too?
A And then Scott began to scream.

Q And you cut Daniel?
A I cut them both.
Q And you killed Daniel because he (undiscernible) and get the knife.
A Yeah.
Q Was that because you were scared or were you mad because he took your knife away?
A I wasn't mad. I was really scared because I had cut him from the ear.
Q And he grabbed it away from you?
A Yeah.
Q How did you cut Daniel?
A I stabbed him in the throat.
Q What did you stab him with?
A And I took the knife and I grabbed him by the back of his shirt and I dragged him back and I slashed him too.
Q How did you cut him?
A The same way.
Q Was he standing there the whole time?
A I don't think so.
How far did you cut his throat?
A I don't know. Oh, God.
Q How far?
A All the way.
Q Did you cut them from behind or in front?
A I don't know.
Q Did you cut Daniel from the front or from behind?
A I really don't know.
Q Did you clean the knife off?
A I wiped it off.
Q You wiped it off where?
A On one of their clothes.
Q On their clothes?
A Uh-huh, and then I went over to a puddle and washed off my hands and the knife.

Q Did you have blood on your clothes?
A No, I had blood all over my hands.
Q And the knife that is in your room. That was the knife that you used to kill them?
A Yeah.
Q And it is the same knife that you used to hack down the trees and put over them?
A Yeah.
Q Was something wrong with Daniel's jacket?
A I don't know. Like what?
Q I mean was it torn in some way?
A I don't know. It might have.
Q Did you pick Daniel up and put him down or did you throw him a little?
A Right. He tried to run a little bit.
Q Which way did Scott run?
A He tried to run along the log away from the big tree.
Q Going back towards the skate board ramp?
A He walked by, beneath the tree and got to going this way and I got him from behind and I backed him into the tree and--
Q Was this the tree you used to stand on?
A Yeah.
Q Did you bang his head?
A I grabbed him by his shirt, you know, and the other side of his neck, and I went like this.
Q Did you have him by the back of his shirt ?
A Yeah.
Q Did you hit his head again?
A (No audible response.)
Q Was Daniel already laying inside there or did you have to move him?
A I don't know. I can't remember.
Q Shawn?
A Yeah.
Q Was Scott standing up when you cut him or was

he laying down?

A He was on the ground, (undiscernible.) Why is that important?

Q Okay. Did you lay Daniel this way and Scott that way (indicating)?

A Uh-huh. (Undiscernible.)

SGT. VANDERHEIDEN: Shawn, you need to come out now.

Shawn, you go ahead and have a seat, okay, son? Are you doing okay? Shawn?

[Shawn was searched.]

SGT. VANDERHEIDEN:

Do you have anything else? Can you stand up for a minute? Your wallet--turn around for me. I'm just checking you. Okay.

[The interview ended.]

DET. S.W. HOFFMAN 3/8/91

1540 hours, I spoke with John Carl Cleapor, male, white, age 16, DOB 5/21/74, home address 606 Corning Court, Virginia Beach, VA, phone 422-5748, school address First Colonial. Mr. Cleapor's parents were contacted before this interview and gave permission for Cleapor to be interviewed. Cleapor was interviewed at headquarters in the presence of NIS Agent Marushi. Cleapor was asked to go back to Saturday before the victims were found and give a recount of his daily events through Tuesday night.

Cleapor stated on Saturday, 3/2/91, around 1:00 - 2:00 pm, he was with John Fortin and Emile Fortin, working on a fort in the woods in front of Wadsworth Housing. The same woods where the victims were found. Cleapor sates before this, he was inside his house up until this time. Cleapor states that John Fortin had brought along with him a hammer, a hatchet, and a survival knife. Cleapor states that they were using these tools to chop small trees and put together a fort. Cleapor states after several hours, he went to his house around 3:00 - 4:00 pm, and then went back out into the woods. Cleapor states that once back in the woods he, John Fortin, and Emile Fortin continued to build their fort. In asking Cleapor if anything unusual occurred during the day, he did tell me that he observed Mike Simms and Jeremy come up to the fort somewhere between 2:00 - 3:00 pm. Cleapor states that he observed John Fortin run over to Jeremy and take the survival knife and hold it several feet away from him and tell Jeremy if he brought anyone else to the fort, that he would kill him. Cleapor states the was standing 5 - 10 feet away from John Fortin and Jeremy when Fortin said and did this. Cleapor states this is the only thing unusual he noticed.

Cleapor stated his events on Sunday were that he left his

house around 12:30 pm and went over to Shane Young's house. Cleapor states that while at Shane Young's house, John Fortin waked by and asked him if he wanted to go to the fort and Cleapor stated yes. Cleapor states that he and Fortin went to the fort, and present were John Fortin, Emile Fortin, and himself. Cleapor states that John Fortin had the hatchet, the hammer, and the survival knife. Cleapor states that Emile Fortin had a small white folding knife. Cleapor states that he and John dropped Emile off at the fort and grabbed a book bag and went up to some new houses up near Birdneck Lake and they were retrieving nails from off the ground to build the fort. Cleapor states when they returned, they found Mike Simms and John Ickes at the fort. John Ickes was chopping trees near the fort and John Fortin became very upset with John Ickes. John Fortin turned to Mike Simms and asked him why he brought John Ickes out here. Cleapor states that Fortin turned to Mike Simms and told him if you bring anyone else out here, I'll kill you.

Cleapor states it was raining heavily at this time. Cleapor stated at this time that he, Fortin, Emile, and the rest, went to check in at their homes and change clothes. Cleapor states that he returned back outside along with John Fortin and Emile and went back over to the fort. Cleapor states around 4:30 or 5:00 that they went back home for the evening. Cleapor states he stayed in the rest of the night. Cleapor admitted to cutting some saplings down in the area with the survival knife. Cleapor states he would have to hit several of the saplings three or four times in order to get through them. Cleapor states to his knowledge, John Fortin took the hatchet and other tools home with him in the blue book bag and put them in his house. Cleapor also told me at this time that the survival knife had a broken tip.

Cleapor described the following events that occurred on

Monday. Cleapor states that he was at First Colonial High School until 10:20 am, when he went to Virginia Beach Junior High with Chris Napp. Once at Virginia Beach Junior High, he arrived at 11:00 am, and went into the office and signed in. Cleapor states he was at the school to give a lecture on Vo-tech. Cleapor states he then responded to the living room #407 and checked in with Ms. Fisher. Cleapor states that he was Randy Logstien in room 407. Cleapor states that he gave a presentation on Vo-Tech until 2:40 pm. Then he responded back to the office and signed out.

Cleapor states he then caught a ride from Jim Roberts to his house. Cleapor states that Roberts goes to Kellam High School and drives a silver min-van. Cleapor states that on the way home from Virginia Beach Junior High, that they stopped off at the post office at Hilltop and then to the 7-Eleven at General Booth and Birdneck and arrived there around 3:30 pm. Cleapor states he then went to McDonalds at General Booth and Birdneck and order a quarter pounder, a large fry, and a drink. Cleapor states he observed behind the counter, Paul Smith who he believes is the manager of the McDonalds. Cleapor states that he ate there for 10 - 20 minutes before he started home. Cleapor states his route of travel was through the woods behind McDonalds to Treefern Drive and then to Kela Circle, then to the trail that leads next to the borough pit to the front of Wadsworth Housing. Cleapor stated he arrived home somewhere around 4:30 pm, and checked in with his father. Cleapor states at this time, he is unsure if he stayed at home or went to Shane Young's house.

Note: Detective Marushi interviewed Cleapor's father who advised that Cleapor was in the house from 4:30 pm Monday evening, and did not leave the home that night.

Cleapor stated at this time, that if he went to Shane Young's house, he would have gotten there around 4:40 pm and stayed there until he had to return home around 5:30 pm.

Cleapor stated that on Tuesday morning, while in school at First Colonial, Shawn Novak approached him just after second bell on Tuesday at 9:25 am. Cleapor states that he was talking with Novak next to the auditorium and Novak was talking with him in a normal voice. Cleapor states that Novak said he has something to tell me, but he doesn't want me to tell anyone else. Cleapor states that Novak stated he was the last to see the two kids in the woods and that it was Daniel and one of his friends. Cleapor stated that Novak said the last time he saw them he was in the woods watching them walk along the edge of the lake toward the pool (see diagram drawn by Cleapor). Cleapor also told me that Novak told him that just after seeing them, he went to the 7-Eleven and saw their bikes sitting near the borough pit. Cleapor states that Novak told him, after going to the 7-Eleven, he returned via the same path and saw their bikes still at this location next to the borough pit. Cleapor stated that Novak told him that he did not see Daniel or the other kid at this time.

Cleapor was asked at this time why he did not reveal this information the previous day. Cleapor stated because he thought if he told us this, that we would think Shawn Novak killed the two kids.

Cleapor stated that on Tuesday afternoon, he got off the bus around 2:30 pm at the McDonalds. At this time he told me that Shawn Novak was standing at the McDonalds and said that he had gone to the 7-Eleven and got a Pepsi and was waiting for him. Cleapor states that they went into the woods behind McDonalds and were walking

toward Treefern Drive, talking about the children that were missing. Cleapor told me that Novak stated to him, as they just entered the woods behind the McDonalds, that if we went out in the woods, we could probably find them. Cleapor states that while walking down Treefern Drive, they passed several police cars. Cleapor states that as they came up to Kela Circle they were traveling the path along a borough pit and into the woods. Cleapor states while they had just entered the woods, Novak told him whoever killed the two kids was really sick. Cleapor stated that he agreed with him at this time. Cleapor states that Novak asked him if he wanted to come back and look for them, and Cleapor stated sure. Cleapor states he went home and checked in with his father and said he was going to help look for the missing children. Cleapor's father replied to him to be back in two hours. Cleapor stated that he went outside and Shawn Novak was waiting for him.

Cleapor states they then went over to Shawn's house and went upstairs into his room. Cleapor states while inside Shawn's room, Shawn was changing clothes, and Cleapor states he noticed that there was a large knife sitting on a book on Novak's table and also there was a throwing star. When asking Cleapor to describe this knife to me, he described it as a partially rusty blade with a brown type of bone handle. At this time, I had Cleapor draw me a picture of this knife (see diagram #2 drawn by Cleapor). Cleapor stated this knife had a single edge and was approximately 10 - 14 inches long. Cleapor stated he has seen Shawn take the knife into the woods on several occasions.

Cleapor states he gave him a double edge knife that was black in color and had serrated edges on both sides, several months ago. Cleapor states that he has asked for this knife back on several occasions, and Shawn has stated

that if he gave it to him, he must have lost it in his room and can't find it.

Cleapor states while inside Shawn's room that Shawn brought up Kender and that Kender could find anything and if anybody could find the kids it would be Kender. In asking what Kender was, Cleapor stated that Kender was a character in Dungeons and Dragons. Cleapor described Kender as being a little 4 foot, green, pointed eared monster. Cleapor states he is also a player of Dungeons and Dragons. Cleapor states that John Fortin is also a player of Dungeons and Dragons. Cleapor states that Kender is a thief and an assassin. In asking Cleapor if Kender was a paid assassin, Cleapor stated no, he was not. Cleapor states that Kender would kill if he thought it would be fun or if he could get away with it. Cleapor states that Kender never gets caught in any thefts or any murders. Cleapor told me that he believes Shawn Novak takes Dungeons and Dragons too seriously and also takes it too far. Cleapor stated his character that he played was a wizard and magician that had great powers. Cleapor states that before leaving the house, Shawn made a comment, if we find the kids, we will be heros.

Cleapor states once outside of Novak's house, they went into the woods on the main trail in front of Wadsworth Housing and walked past the borough pit to Kela Circle over to Treefern Drive and spoke with an officer, who he believes his name was Pumphrey. Cleapor states at this time he and Shawn both checked in with this officer and this officer told them that they could go up to South Birdneck Road near Prosperity and walk through the woods at this location. Cleapor states while walking toward South Birdneck Road they ran into Louis Rich. Louis then went back to sign in with the officer. Cleapor states while Louis Rich was walking back to sign in with the officer, Shawn said what if we find the killer. Cleapor

stated he didn't say anything at this time. Cleapor states after Louis Rich arrived back, he turned to Louis Rich and asked Louis, what would he do if he found the killer. Louis said we would bum rush him and Cleapor stated at this time Shawn said he would be running. Cleapor states at this time they went into the woods at South Birdneck Road and Prosperity and began walking in southwesterly direction. Cleapor states at this time they ran into two forts and were checking them out. Cleapor states that Shawn said to us, the best place to look for dead kids is in holes covered with branches and brush. Cleapor states that they all walked down to the main trail that runs from Wadsworth Homes to the borough pit. Cleapor states while walking toward the main trail, they were all walking 10 - 15 feet apart, parallel with one another. Cleapor states once at the main trail, Shawn stated, I'll go back and tell the officers we didn't find anything. Cleapor stated that Shawn says, I'll meet you guys at your fort. Cleapor told me at them time he thought this was unusual because he didn't known Shawn knew where their fort was. Cleapor told me this is the same fort that he and John Fortin were working on Sunday and Saturday. Cleapor stated that he and Louis went to the fort and found a black rain jacket belonging to Mike Stringfellow. Cleapor states Mike Stringfellow's name was inside the jacket. Cleapor states the believes Mike Stringfellow goes to First Colonial High School and is in R.O.T.C. Cleapor states that they stood around the fort for 5 - 10 minutes and Shawn showed back up. Cleapor states that he told Shawn and Louis that we'll split up 10 -15 feet apart just like we did before and start walking in the same direction as before. Cleapor states that Shawn at this time pointed in the direction of where the boys were found and said we'll walk toward to this location. Shaw at this time asked Cleapor again, what if we run into the killer. Cleapor states he replied I guess we'll rush him. Cleapor states they were walking in a straight line and described Shawn

as walking in front, Cleapor the middle and Rich walking behind both them. Cleapor states that they were talking about being pricked by pricker bushes at this time. Cleapor states that he got up to a swampy area and they came across a road. Cleapor states at this road he saw some security people and police. Cleapor states at this time he asked a lady what time it was and she replied 4:45 pm. Cleapor states that Shawn stated that he was going to go with this group who was now proceeding south and Cleapor replied that he and Louis were going home. Cleapor states that Shawn stated he didn't have to be in until dark so he would travel with them.

Cleapor states the next time he heard from Shawn was around 5:30 pm, when he came over to his house and said that he had found the boys. Cleapor states that Shawn said some guy saw something move and thought it was a snake and I reached down and grabbed onto one of the boy's arms. Cleapor states he told Shawn at that time he didn't believe him and Shawn replied okay, fine, then just watch the news. Cleapor states at this time Shawn then left and he went back inside. Cleapor states around 6:30 pm, he saw the news and then believed Shawn actually found the kids. Cleapor also told me at the end of this interview that while standing near the fort, Shawn was pointing in a southeasterly direction and saying that if he did it, he would hide them in the swamp and cover them with branches and brush.

1850 hours, this interview was concluded.

SWH:dt

DET. TUCKER

03-07-91 1910 Hours. Special Agent F. Ewell and I responded to 922 Catskill Court and interviewed James Young. Mr. Young's DOB is 11-30-71 and his Soc. is 278-70-7957. Home phone umber is 422-0007.

It is to be noted that James Young is nineteen ears of age but has the I.Q. of a fourteen year old. This information was provided from Mrs. Beery, James mother. Mrs. Beery was present while we interviewed James.

James informed us that he considered Shawn Novak his best friend. James would see Shawn every day. As a matter of fact Shawn had stopped by on Monday between 1500 and 1530 hours. They had retired to James's room and had listened to music. The groups they listened to most often were: Warrant, Guns and Roses, Motley Crew, Wierd Al Yankovich, Dr. Dimento, and Ozzie Osborne. When they weren't listening to music they would watch television. James also informed us that several other friends visit on a regular basis. They are: John Cleper, Chris Stead, Jamaal (Last name unknown to James), Don Williams, Ken Jensen, and Andy Mantes. Shawn had left James's house no later than 1600 hours. Once he had left, James did not see him until Tuesday morning before school. Several kids always come by James's house before school to visit. For some reason, Shawn appeared uptight. James did not know the reason why. At this point of the interview Mr. Beery advised that she is called Mom Beery by the neighborhood kids. Her home is a place they all come to talk about their problems and to relax. As a result Mrs. Beery knows about their home life. She then stated that she had some information for us once we were finished interviewing James. She did not want James present while she spoke to us.

On Tuesday, the 6th of March, Shawn visited at 1420 hours. He had just gotten of the school bus. He had stopped by before going home. James knew this because Shawn still had his school books with him. Shawn did not stay long. He left without listening to music or watching television.

Shawn showed back up at James house before the 6 pm news. Chris Stead was with him. Shawn normally knocks then enters the house but this time he had ran into the house without knocking and he appeared to be very excited. Shawn had told them that he had found the two boys in the woods. This information was provided before any announcement on the television. Shawn explained that the boys had been found dead. Shawn the requested that they watch the news because he wanted to see if he was going to be on the news. He was concerned that his mother would be upset and mad at him if she found out he had been in the woods. Shawn was not allowed in the woods. Mrs. Beery explained that Shawn had never asked to watch the news before and this was out of the ordinary for Shawn. After the news was over Shawn had gone home Since it was 1830 hours. This was curfew for Shawn. Chris Stead stayed until 1900 hours. Before the news broadcast had come on, Don Williams had asked Shawn to tell his mother about finding the boys. The two of them left and went to Don's house for a short while but returned before the news came on. Shawn had also informed James and his mother that he had been the last one to see Daniel Geier and Scott Weaver alive. On Monday afternoon around 1600 and 1630 hours Shawn had seen the two boys riding their bicycles on Hudson Drive at the intersection of Prosperity Road. They were waiting for traffic to clear to cross the road before entering the woods. There is a path everyone uses when entering the woods.

James was asked if he had ever visited the wooded area and if he did what type of activities he took part in. James explained that most of the time the woods were used as a cut thru to the 7-11 store. I asked James if he could confide in Shawn things he did not want any one else to know. James answered "Yes". James was then asked if Shawn confided in him things he did not want anyone else to know. Again, James answered "Yes, I hope so". The interview with James ended at this point and once James left the room we continued talking with Mrs. Beery.

Mrs. Beery explained that on Monday night Shawn had explained that Shawn had told her that he had checked a book out from the bookmobile on serial killers. Shawn had also explained that a serial killer is the hardest person to track down since the serial killer has no motive. We also learned that in order to check out books, a library card is used. Mrs. Beery also informed us that a woman usually drives the bookmobile.

At this point Mrs. Beery stated that Shawn had ran into her house and excitedly explained that he had found the kids. This took place before any news broadcast had announced the kids being found. Shawn also explained that he had kicked a hand of one of the boys. After he had found them he left real quick because he did not want to be on the news. He did not want his mother to find out he had been in the woods since he was not allowed there. Shawn had advised that he had been a part of the search group. Mr. Beery continued saying that she suspects Shawn of knowing more than what he is saying. Mrs. Beery appeared to be very concerned and at times she would shake very heavily and repeat over and over that Shawn knew more than he was saying. Mrs. Beery did not know if Shawn would check out books on a regular basis and read. Shawn had been there earlier today and had

explained that he was going to the police station to look at a police line-up. This took place just before 1600 hours because Shawn's mother had gotten home at 1600 hours and had sent Jimmy, Shawn's brother over to tell Shawn to go home.

Mrs. Beery had noticed the change in Shawn's actions. This change had taken place earlier on Monday or Tuesday. She described Shawn's actions as being hyper, shakey and he would not sit still, Shawn's parents had accused him of using drugs because of the way he dressed and his hair being long. When Shawn was not hyper, he appeared very quiet as if he was withdrawn. Mrs. Beery also had heard Shawn complaint about his religion, while in church he would sit on the back row so that he could sneak out and smoke. He was forced to go to church, he went three times a week, on several occasions James went with him.

03-08-91 1245 hours. Special Agent Ewell and I returned to Mrs. Beery's home at 922 Catskill Court. Her DOB is 09-12-52, Soc. 290-56-1264. Her home phone number is 422-0007.

Mrs. Beery advised us that John Cleper had been at her home some time earlier in the week but she was not sure if it was Monday or Tuesday. If he was there he did not stay long. She did say that John had been to her house the day before listening to music with Shane, her 17 year old son. He had told Mrs. Beery that he had been on the search looking for the two boys on Tuesday. He was there after 1500 hours but she did not know for sure. Mrs. Beery then advised that she had remembered after we left the night before that Shawn Novak had been to her house about a month ago. While he was there she had noticed a big knife that he was carrying around in shoulder pocket of his jacket. She described the blade on the knife

between eight to ten inches long. She could not remember the color of the handle. Shawn Novak had explained that he was going into the woods and throw it at trees trying to get it to stick. Again we asked if Shawn had been to her house on Monday, the 5th of March. Mr. Beery answered saying that he was at her house between 1430 and 1530 hours but he had left by 1630 hours, she knew this because she watches the Brady Bunch and it comes on at 1630 hours. Shawn was not there at that time. Mrs. Beery was asked if Shawn had returned Monday evening. Mrs. Beery did not remember if she and Shawn had discussed the two boys missing Monday night or if they discussed it Tuesday morning when he had stopped by before the school bus arrived.

Mrs. Beery informed us to check with Sarah Williams. Shawn had told Mrs. Williams about him finding the two victims on Tuesday afternoon. Mrs. Beery also informed us that she knows that Shawn Novak, John Cleper, Chris Stead and Andy Mante or Mande play a game called Dungeons and Dragons. This game is also referred to as D and D. Andy Mante or Mande has not been to her home since the boys had been found.

As Special Agent Ewell and I were leaving I asked him if Shawn had a nickname that he was called. James informed me that Shawn was Kinder. James did not know who Ranger was. James indicated that D and D was a game played with dice and that it was a prediction type game.

U.S. NAVAL INVESTIGATIVE SERVICE

TITLE: S/Novak, Shawn Paul/Civ
CCN: 05Mar91-05CE-0023-7HNS

Investigative Action: Results of Interview with Jennifer Whitworth

On 08Mar91. Jennifer Lee Whitworth was interviewed at her residence located at 668 Corning Ct, Wadsworth Housing, Virginia Beach, Va. As background, Whitworth was being interviewed for any knowledge she may have of Shawn Novak and his whereabouts on Monday or Tuesday (04 and 05Mar91)

Whitworth said she may have seen Novak on Monday during the day. However, not on Monday night.

She recalled Novak came over to her residence on Tuesday, 05Mar91, between 2030 and 2100, and that he stayed for approximately one hour. Whitworth recalled her mother, sister, brother and another individual named "David" were holding a conversation in the living room at the time Novak was there. She recalled Novak indicated he felt sorry for the parents of the boys who were found killed, and he hoped that the individual responsible would be located. Whitworth also recalled Novak indicated that he had helped find the boys. Whitworth recalled hearing Novak say this on Wednesday, 06Mar91, between 1445 and 1500.

Whitworth also stated that Novak told her on Thursday, between 1445 and 1500, he was a member of the search party and he went over and grabbed the hand of one of the boys who had been killed. Whitworth recalled that he had explained this to her mother first. Whitworth was asked to explain exactly what she recalled Novak had said,

and she indicated the following: Novak said he was with the search party, and then he told someone he was going to leave the search party. Whitworth further stated Novak has not talked a great deal in reference to this matter. She described Novak as being "king of odd." She felt it unusual for an older young man to be such close friends with younger boys, such as Michael Luttrell (Michael is Jennifer's brother). Jennifer further advised, many of the little children go into the woods to play.

Jennifer further reiterated, Novak did not come over to her residence on Monday, 04Mar91. Novak did, however, come to her residence on Tuesday night for 15 - 20 minutes or so. She felt Novak would not want his brother to know that he was the person who found the young boys, since his brother was a friend of one of the boys. When asked if she knew of any other friends that Novak would associate with he stated that they were Andy (NFI) and John (Possible last name of Otam).

Biographical Data

Employment:	Student
DOB:	15Mar75
Residence:	668 Corning Ct., Virginia Beach, VA

03/08/91, 1330 hours, the Assistant Principal of First Colonial High School, Mrs. Anthony called me back in reference to my request on the boys. She said she would like for Shawn Novak's art Teacher to speak with me personally in reference to Shawn.

I then spoke with a Ms. Edna Lawrence. She advised me she had already spoken with the principal of the school, Mr. Atkinson about Shawn. She stated that on Wednesday, 03/06/91, at fifth bell, which is approximately 11:25, when she came in the classroom, Shawn was anxious to talk to her in reference the two dead boys. He told her all about how they had been slashed and how he and his friend's had helped the police look for the bodies. He stated the first time they passed over the bodies and did not see them. The second time, he saw what looked like a snake lying under some bushes and when he reached to pick it up, it turned out to be a bloody hand. At this point, he became so graphic in his description of the dead bodies that the teacher made him be quiet for the rest of the bell, as he was upsetting the rest of the children. She became greatly concerned about Shawn, as during the course of this description he showed no remorse or any emotion of any kind. It seemed more like he was fascinated with telling the story because of the blood and gore. She said, it was almost like he was reading a fairy tale. Then before he left class he asked Ms. Lawrence not to say anything about him showing the police where the bodies were, as he didn't want his mother to know he had found them.

On Thursday, 03/07/91, there was a substitute in the art class, a Mrs. Margaret Towns, home 425-1404. When Shawn came into the classroom that day, he immediately went up to Mrs. Towns and began to try and tell her the story about the boys bodies. He told basically the same story he had told to Ms. Lawrence the day before, except

he said the police were wrong about the bodies position or either they had lied to the newspaper about the bodies. One kid sitting at the table near him said, Shawn, you probably did it yourself, at which time he made no comment, but shrugged and walked off.

Ms. Lawrence said that when Shawn first came to her at class in the beginning of the school year, he had to sit at a table by himself and that the other children were afraid to sit with him because he kept talking to an unseen person named Kender. She believes it's spelled K-e-n-d-e-r, She said that Shawn is subject to severe mood swings, anything to get attention, even to crawling on the floor and then acting like he's in a state of severe depression. One time during this year, she found him sitting in a far corner of the art room with his feet in a trash can.

She stated that for approximately the last month, Shawn has been going down hill, getting more and more quiet, wanting less and less attention and becoming more depressed.

Last year, the kids were talking about how he had walked around the school with a string tied around his neck, that had assorted items on it. The most unusual of which was a dead bird's head.

He also told Ms. Lawrence about a case one month ago, where a missing person had been found dead and the police did not tell all to the newspaper then or if they did tell it, they had lied because the newspaper was wrong about some of the things they said concerning the dead body. He told her he had informed the police about a man with one arm or a very short arm that hung in the woods that all the kids were afraid of.

Ms. Lawrence has been concerned about him most of the

year because all of his art work seems demonic in nature. Every hand that he draws has four fingers with an eye in the palm. He calls his art work a kender. At times, the teacher said she feels like she is talking to a demon whenever she talks to him. At those times, she says she backs off and leaves him to work at his table alone because she's afraid to approach him.

It seem that he loves anything gory. She said she has tried at times to sensor his gross work and encourage him into a different field of art.

She said that on Tuesday morning, when he came to art class, he had called her over to his table and was trying to tell her about the two missing boys in his neighborhood and how the bikes had been found. This was followed up by the incident she reported on Wednesday.

She has some more of his art work at another school with her. She will bring this art work to First Colonial on Monday, and leave it at the office, along with the art work that she has already brought to the office, so it may be viewed by the police if necessary. She will be available after 11:15 on that date, if we wish to speak with her again.

U.S. NAVAL INVESTIGATIVE SERVICE

TITLE: S/Novak, Shawn Paul/Civ
CCN: 05Mar91-05CE-0023-7HNS

INVESTIGATIVE ACTION: RESULTS OF INTERVIEW WITH JAMMIE ALLEN

One 08Mar91, Jammie Allen was interviewed at her residence located at 668 Corning Ct, Wadsworth housing, Virginia Beach, Va. As background Allen was being interviewed for any knowledge she may have relative to her association with Shawn Novak.

Allen stated on Monday, 04Mar91, Shawn Novak did not come to her residence at all. Allen further stated, Monday evening, her family went out to dinner and it was not until later Monday night that they learned that the two young boys were missing.

Allen indicated she recalled talking to Novak on Tuesday, 05Mar91. Allen recalled Novak came over at 1800 at the time that the news was being aired on television. Novak brought his brother over and left him at their residence. Allen then recalled he came back sometime between 1900 - 1930. Allen recalled Novak watched television with them during the evening hours.

Allen additionally advised Novak came over to her residence on Wednesday afternoon. Normally when he comes over, they talk about various subjects.

When asked about any knowledge relative to individuals going into the woods that are adjacent to her complex, Allen said many individuals go into the woods to play. She advised Shawn Novak, Andy (NFI), John (NFI), and Jimmy (NFI) go into the woods to play. She additionally

stated Novak plays with little children from the community. Allen further stated many of the young people play "Dungeons & Dragons" games. She specifically related Novak plays "Dungeons & Dragons" which is a make-believe game where various roles are played. The game is played with books, and individuals play various characters, acting out stories. Allen additionally indicated young people drink beer or "party" in the woods at various times, in fact she indicated she had been asked to party in the woods, but had not done so.

Biographical Data

Employment:	Student
DBO:	31Jan75
Residence:	668 Corning Ct, Virginia Beach, VA
Reporting Agent:	F.V. Ewell
Participating Agent:	Patrick Tucker, VBPD Homicide Division
Reporting Office:	NISRA Dam Neck, VA
Date Typed:	12Mar91

Investigative Action: Results of Interview with Beery

On 08Mar91, Mrs. Leilani Marie Beery was interviewed at her residence located in the Wadsworth housing area, Virginia Beach, Va.

Beery was asked if John Cleapor was known by her, and if he was at her residence on Monday, 04Mar91. Mrs. Beery said she could not be sure if he was at her house or not, and if he was it only for a short time on Monday. Beery did indicate that Cleapor was at her residence on Tuesday, sometime after 1500, and she did not recall the time that he left. Mrs. Beery said she thought that Cleapor might be involved in drug use, and that he was allegedly involved in stealing cigarettes from some of the convenience stores located nearby the housing area.

Beery further stated Novak had a knife and that he would go into the woods and throw the knife on occasion.

Mrs. Beery reviewed the schedule of events that she had provided previously, and confirmed the following: it was on Monday night that Novak had come to her residence and talked with her in reference to serial killers. She further indicated Novak mentioned the two boys being missing on Monday night or Tuesday morning. Beery stated she recalled on Monday at about 1430 Novak came by her house and then left. He returned to the residence and left at the latest by 1630. Upon further reflection, she indicated that he may have come back later and they talked about the children being missing. Mrs. Beery further indicated that after the 1800 news broadcast on television, Tuesday night, she talked with Sarah Williams and she was told by Mrs. Williams that Novak had talked to her.

Mrs. Beery further indicated Novak, John Cleapor, Chris

Stead and Andy Manes play the "Dungeons & Dragon" game. It was her understanding that Novak plays a character called "Kender." Mrs. Beery said the game is supposed to predict death and is played with dice.

Mrs. Beery had no additional pertinent information to advise.

Biographical dated

Employment:	Housewife
SSN:	290-56-1264
DOB:	12Sep59
Telephone:	(804) 422-0007
Reporting Agent:	F.V. Ewell
Participating Agent:	Patrick Tucker, VBPD Homicide Division
Reporting Office:	NISRA Dam Neck, VA
Date Typed:	12Mar91

CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH, VIRGINIA

Excerpts from Transcript of the Hearing on the Motion to Suppress held before the Honorable J.K. Moore on February 3, 1992

JENNY ELLEN NOVAK, called as a witness on behalf of the defendant, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRYDGES:

Q Mrs. Novak, will you give your full name, please ma'am.

A Jenny Ellen Novak.

Q You are the mother of the defendant, Shawn Novak, that sits at counsel table?

A Yes, I am.

Q How old is Mr. Novak?

A He's seventeen.

Q When did he turn seventeen?

A January 20th of this year.

Q This past month?

A Yes.

Q At the time of this offense back in March of 1991, he was how old?

A Sixteen.

Q When was the first -- was he living with you at the time of the arrest?

A Yes, he was.

Q Where was that, Mrs. Novak?

A That was Corning Court in Virginia Beach.

Q When was the first that you heard from any of the police officers regarding the possibility of your son's involvement in these offenses?

A They called me at work on Wednesday.

Q And the offense took place on what day?
A On a Monday.
Q When they called you at work, who was they if you recall?
A I believe it was Detective Hoover.
Q And where was he at the time he called you?
A He was at my house.
Q Using your phone?
A Yes, sir.
Q Who was at home at the time Mr. Hoover was here?
A My three children.
Q Including Shawn?
A Yes.
Q Did you go home then or did he tell you why he wanted you to be contacted?
A He told me he was -- he asked me if he could speak to the children. I told him, no. He told me they were doing a door-to-door search talking to everybody in the whole neighborhood, that it was all routine, and could they talk to the children. After telling him no several times and him arguing with me, I finally consented to let him talk to the children. I did not know that he was at my house when he called. I thought that he was probably at the police station. I planned to leave work and be there by the time he arrived.
Q So when you got home, what did you find?
Q I called home first and talked to my middle son, Jimmy. He told me that the detective talked to them and everything was okay. They were talking to Shawn.
Q Where did they have Shawn when they were talking with him?
A In the police car in front of our house.
Q Did you go out to the police car?
A No. I finished what I was doing at work and came home after that. Shawn was still in the police --

no, he was not. I take that back. He was in the house. The detective had left our house to take another boy home.

Q All right. Now, did the detective come back that evening?

A Yes, he did.

Q What time did he come back on that Wednesday?

A I'm not sure when it was.

Q Sometime after dark?

A Yes, it was after dark, probably 6:30.

Q During the course of that visit with your son, did you sit in on the conversations or did he ask that you not be there?

A No. He talked to me at the house and wanted Shawn to go to the police station and talk to them so I would not be there. He wanted to take him out in his car and buy him a hamburger he said and talk to him alone. I refused to let him do that. He kept insisting that he had to talk to him alone. Children would not talk in front of their parents if they had been smoking or doing anything like that.

Q Was that his reason for telling you that he didn't want you to be there? Because Shawn might not want to admit that he smoked or drank beer or something?

A Yes, it was.

Q Did you have any indication from the officer at the time that you were talking with him that it had anything do with it being easier to get a confession if you weren't are?

A No, sir.

Q Did you have any conception that he was going zero in on the crime itself with you not being present?

A No.

Q Now, how long did he stay in the house that evening, Mrs. Novak?

A He was only in the house for a few moments. He took me out in front of the house to talk to me alone

because he didn't want to talk to me in front of Shawn. He was very, very rude. We argued. He insisted that he needed to come down there. I wanted to help if there was anything that we could do to help. I wanted Shawn to be able to help, but I was frightened for Shawn. I did agree to go and take Shawn there.

Q Did you do that I guess the following day?

A No. That was the same night.

Q Same night. You took him down the same night, Wednesday night?

A Yes.

Q Where did they take Shawn and you when you got there?

A When we came in, they had me stay out in the lobby -- not a lobby, but like a reception room. They took Shawn back in the back. I later found out he was in the interrogation room.

Q Did they invite you back to go with him?

A No, they didn't.

Q Did you tell them you wanted to go?

A They knew I wanted to be with him.

Q How did they know that, Mrs. Novak?

A I made it very clear at my house before we came down there. That was the reason that they insisted that I needed to bring him down there so that I would not be there so they could talk to him alone.

Q How long did you wait in the anteroom or little waiting area before they allowed you to come in?

A I did not come into the room that night. We were there about two hours.

Q So you allowed them to talk with Shawn by themselves on Wednesday night for two hours?

A Yes.

Q With Detective Hoover. Did they ever come out and talk to you?

A They came out when they took Shawn in there -- before they took him in. Whenever they brought him out

--when they were finished talking to him, they came out with him and brought him to me.

Q When they finished with him on Wednesday night, the first time you saw him was two hours after you let him go back to the interrogation room?

A Yes.

Q Did the officers give you any statement about why they didn't want you there other than the fact he might not want to talk about having done some bad things like drink beer and so forth? Is that the only reason they didn't want you back there?

A Yes. That's all they indicated. If the kids had seen anything, if they had been partying with their friends, whatever, that they just would not open up with their parents there.

Q Did they at any time advise Shawn of his Miranda rights or his right to remain silent while you were with him?

A No.

Q Did you have occasion to see the interrogation room as to its security, whether it was locked or unlocked?

A No, I didn't.

Q And when they delivered Shawn back to you after two hours, did they bring him to the lobby or where you were sitting and let you take him home?

A Yes, they did.

Q Did they have any conversation with you at that time at the conclusion of that two hours?

A They said that Shawn had misunderstood something that the detective had said, and he had become upset. They apologized for him being upset.

Q Was he crying?

A He was not crying at that moment, no.

Q Could you tell whether or not he had been crying?

A I really couldn't tell that he had been crying. He looked upset.

Q All right. Now, were there any arrangements made for any further interviews?

A They told me that it was getting so late at night and Shawn needed to go home and get his rest. They would like to talk to him again. I told them I did not want them talking to Shawn unless I was present.

Q Did you tell them that Wednesday night?

A Yes , I did.

Q Was there any exception to that statement that you wanted to be present any time they talked to him in the future, you wanted to be there. Is that what you told them?

A Yes.

Q Now then, what arrangements were made about the next visit with Mr. Novak?

A The next I heard from them they called me again wanting to know if they could talk to him. When I realized that they were again calling me from my house and they were already, in fact, talking to him again in my house after I had told them they could not, I was upset about that.

Q What did they do then on Thursday? Did they come to your house again?

A Yes, they did.

Q Did they tell you they were coming?

A No, they did not. They were waiting for Shawn when he got off the school bus.

Q Who called you to tell you that they were there?

A One of the detectives called to ask permission :o talk to Shawn.

Q Do you remember which one that was.?

A I believe it was Detective Tucker that actually called me.

Q When you got home, where did they have Shawn?

A They were not there when I got home on Thursday. They had left already because I told them that they couldn't talk to him.

Q Did they talk to him?
A They did talk to him. They were there. They were in my house. I don't know what they said to him.
Q Did Shawn relate to you after you got home that they had been talking to him?
A Yes.
Q How long were they there, do you know?
A I don't know.
Q So that's two interviews at your house that neither one of which you were present?
A Yes.
Q When was there -- then there was one at the police headquarters in which you were not present?
A Yes.
Q At their request?
A Yes.
Q When was the next interview?
A They called -- Detective Tucker called me again and asked me if I would bring Shawn back in. They apologized for Detective Hoover's behavior. They said he was not normally one of their detectives that worked on this type of case that worked with children. It was all a mistake. They told me that Shawn -- they just needed to get some more information to clarify a couple things that Shawn had already told them. They wanted me to bring him in again and allow them to talk to him again about the same things they had talked to him about before.
Q Was this on Thursday evening?
A Yes.
Q What arrangements were made for you to bring him in again?
A They actually wanted -- they first said they wanted to take him right after school. I refused to let them do that. After I think two or three calls -- I'm not sure -- agreed that if they had to talk to him again, that I would bring him to the police station myself and stay

with him and allow them to talk to him, that I wanted to be there.

Q Did you take him the following day.?

A That was on Thursday that I took him.

Q This was your second trip to police headquarters?

A Yes, it was.

Q On that occasion, can you give us the time of day that you accompanied him there?

A It was probably eight o'clock by that time.

Q In the evening?

A Yes, it was in the evening.

Q All right. Now, did you go back into the interrogation room with him at that time?

A I did not go when we arrived. They did take me back there.

Q Did they take Shawn back there before they allowed you to go back?

A Yes.

Q And got you? How long were they back there before they came

A He was in there for two hours or more that night also.

Q How much of that time were you with him?

A I was not with him in that interview. I was out in the waiting area.

Q We're talking about the second interview?

A Yes, sir.

Q That's the second interview in which you were not present at their request?

A Yes.

Q Now, when you finished that interview and took him home, what condition was he in?

A He did not seem to be upset. He felt good that he was being able to help.

Q Did he mention to you whether or not they advised him of his Miranda rights?

MR. HUMPHREYS: Objection. That would be hearsay, Your Honor. He can put his client on for that purpose.

THE COURT: Sustained.

BY MR. BRYDGES:

Q Did you at any time hear either officer advise him of his right to counsel or anything else?

A No.

Q After the second interview at headquarters, was there a third?

A Yes.

Q When was that?

A That was on Saturday morning.

Q How did that come --

THE COURT: Wait a minute. When?

THE WITNESS: Saturday morning.

THE COURT: Okay.

BY MR. BRYDGES:

Q How were those arrangements made, Mrs. Novak?

A They called me -- Detective Tucker again. He was very nice. He called and talked to me at work. He wanted me to bring Shawn in Friday night. I had agreed to bring him in again after I kept telling them that I couldn't. They kept calling and asking me. So I did agree that I would bring him in Friday night. I didn't get off work until eight o'clock. I did not have a sitter for the other boys. So I did not go on Friday night. I called them late Friday night and told them we could not come in. They said, Oh, that's okay. We understand. It's getting too late to do it tonight anyway. They asked me to bring him on Saturday morning.

Q At what time did you arrive Saturday morning?

A It was -- I'm not sure if it was eight or nine. It was in the morning.

Q Did you accompany Shawn to the interview room on that occasion?

A Yes, I did.

Q Who was in the interview room when you went in?

A Detective Hoffman.

Q And anyone else?

A No.

Q Just the three of you -- Shawn and you and the detective. They conducted the investigation at that time, questioned Shawn?

A Yes, they did.

Q Advised him of his rights at any time?

A No, they did not. All the time they kept telling us Shawn was not a suspect. I was very concerned that they wanted to keep talking to Shawn. I was concerned about Shawn. They kept assuring me that I was being overly worried, that I was maybe even paranoid, that there was no reason for me to be concerned about Shawn because he was not a suspect. They only wanted to clarify something that he had said or bring it out if possibly he had seen something that he did not realize he had seen.

Q Were you able to ascertain what that might have been from the short time that you were in the room with him?

A No.

Q Now, after you were there for some period of time, you were asked to leave?

A Yes.

Q How did that come about? Tell the court how that came about, Mrs. Novak.

A They asked him about his movements, where he had been, what he said seen, what he had been doing, that type of thing. It all seemed very routine. After we

were there for maybe an hour, maybe a little longer, Detective Hoffman said that we'd take a break. He asked me if he could talk to Shawn again alone. If the kids had been smoking, if they had been drinking or anything like that, they would not talk in front of their parents. He wanted to talk to Shawn. He wanted to ask him what his friends were doing.

Q Not about his involvement in the offenses?

A No. They had asked him over and over what he had done, where he had been. They said they had checked out his story. The things he told them -- he was cleared. He was not a suspect. They just simply wanted to know where his friends had been, what they had been doing.

Q Did you have any idea at the time that they asked you to leave that they were going to continue questioning him about the possibility of his being the guilty party here?

A No. Detective Hoffman told me he wanted to ask Shawn about his friends and what they were doing, their activities, where they had been, where they hang out, that type of thing. Teenagers would not talk about their friends with an adult there.

Q What did you say to Detective Hoffman when he asked that you leave?

A I didn't want to go. I'm trying to remember what I actually said to him.

Q What did you say to Shawn? Do you recall?

A I asked him how he felt about me leaving, if he was okay.

Q You said something about freaking out. That's in the transcript.

A Shawn had been using the word freaked out. I asked him jokingly if he was going to freak out. He said no.

MR. HUMPHREYS: Objection to hearsay, Your

Honor.

THE COURT: Sustained.

BY MR. BRYDGES:

Q What was--was there a time thereafter that you left the room?

A Yes.

Q Were there any promises made to you about the police coming to get you if things began to become difficult for Shawn?

A Yes. They promised me that Shawn would be okay. I didn't have anything to worry about. They were only questioning him about his friends.

Q Did they ever mention to you that perhaps it would be wise for you to get counsel?

A No.

Q Did they tell you at any time that Shawn could leave if he wanted to or walk out of there?

A Yes. We were told that he could leave. It was like when they asked me if they could talk to him, I knew I did not have to allow them to talk to Shawn, but I almost felt that I didn't have a choice in the matter because I would tell them no. They would ignore me and keep calling and asking. If I told one detective no, a different detective would call me. one would be -- Detective Hoover was very rude when I talked to him. Detective Tucker -- he would call and apologize for Detective Hoover. He would be very nice, very sweet, and reassure me that everything was okay. They knew that Shawn was not involved in any way. They had not found anything. They had checked out his story. Then they would just keep coming from different directions. It didn't matter what we wanted or what we said. They would just manipulate us until they got us to do what they wanted us to do.

Q Did they suggest to you at any time that you go home and not even stay in the building?

A Yes, they did. They told me Shawn would be fine. They would take him out and buy him a hamburger and a Coke. They would bring him back to me at work, to go on home. If I had some business I needed to take care of or if I wanted to go to work.

Q How did you respond to that, Mrs. Novak?

A I told Detective Hoffman that I absolutely would not leave Shawn there alone. If he had to be there, I would be there with him. I just couldn't leave him.

Q Where was his father?

A His father was in Connecticut on orders. He's in the Navy.

Q You were the only person that he had?

A Yes.

Q Tell me something about Shawn's approach to or response to authority.

MR. HUMPHREYS: Objection, Your Honor.

MR. BRYDGES: I think she can say that as the mother of the child how he responds to authority figures.

MR. HUMPHREYS: The question of what's in her child's mind is not a proper subject of testimony by this witness. Mr. Brydges can put his client on the stand and testify as to what was in his own mind. To try to back door that evidence through this witness, I can't cross-examine on that subject. It is improper, Your Honor.

THE COURT: I'm not going to consider anything that's improper. Sometimes it's very difficult to take a knife to it and dissect testimony. I think I can do that. I have to let the testimony come in. Proceed.

BY MR. BRYDGES:

Q Mrs. Novak, tell me about his response to authority like teachers or parents or police officers.

A He's very obedient, very respectful. Anything you tell him to do, he will do it.

Q Of all your children, would you say he was the most obedient?

A Yes, he is.

Q Now, as you sat there Saturday morning in the lobby, did you have anyone come to sit with you?

A No, I didn't.

Q When is the next time you heard from someone in the interrogation room where Shawn was?

A At some point after he had been in there for a long time -- I'm not sure of the time, maybe two hours. They brought Shawn out to show me that he was okay, that they were treating him -- that they were not being mean to him. Detective Hoffman had assured me that he does not hit children and does not raise his voice to them. Shawn would be perfectly safe with him. So at that time he brought him out to show me that Shawn was okay, that they had not been mistreating him.

Q Did you have any discussion with the detective at the time, Detective Hoffman, at that time about wanting to go back in?

A No, I didn't. I didn't ask him at that time if I could go back in. I guess I felt defeated. I had tried and tried. They had ignored my requests. I just simply asked Shawn if he was okay.

Q Did he tell you at that time that the interrogation had become accusatory or that they were no longer interested in what Shawn's friends were doing or other details, that they were interested in Shawn's participation, if any, in this offense?

A No. They didn't discuss that at all. They just said they were giving him a break to get him a Coke or a doughnut or something. I don't remember.

Q What's the next thing you heard after he had been

in there two hours -- two hours from the time you first left until they came and told you he was fine. What's the next you heard?

A The next I heard was -- I believe it was Detective Price. I mix their names up. Anyway, the detective came out and told me, This is going to be hard for you to hear, but Shawn said he did it.

Q How long was that after they had brought Shawn out to tell you that he was all right?

A Less than an hour, maybe thirty minutes. I'm not sure.

Q Somewhere between thirty minutes and an hour from the time it was accusatory, they came out and told you your son had confessed?

A Yes.

Q Did you hear any rights given to your son at that time?

A No, I didn't. I asked them if I could see him at that time. In fact, I told them I wanted to see him. They said, yes, that's okay. They asked me could they question him further. I said, No, you cannot. I want to see him. They said it's okay. He's in a room. He's in there by himself. There's no one with him. They told me how shocked they were, that Detective Hoffman was so shocked at hearing this from Shawn that he almost passed out. He was so pale when he stepped out of the interrogation room. He almost passed out on the floor.

Q Did you notice him being pale?

A I didn't see him after that. They kept asking me could they talk to Shawn and ask him further questions. I told them, no, they could not. I wanted to see Shawn. I asked how Shawn was. They said he's okay. When they took me back there, they didn't take me to Shawn. They shuffled me off into an office. They were very polite, very kind at this point. They didn't take me to Shawn. They assured me that Shawn was in the room by himself just sitting there. They helped me to find --

they let me use their telephone. I called my husband. I had to make calls to find out the number. I didn't have where he could be reached.

Q What is the next time you saw Shawn?

A It was probably at least a half hour, maybe longer that I was in this office before they actually took me and let me see Shawn.

Q Had they continued to question him?

A They told me they were not. I was not there.

Q During the many, many times that the police met at your house and you took your son to headquarters, had you been present when this interrogation was going on and it became sensitive, would you have asked for a lawyer?

A Yes, I would.

Q Would you have told your son not to say anything else?

A Yes, I would.

Q Do you know what the Miranda rights are and understand them?

A I'm not sure I understand all of them. I do know he could have a lawyer.

Q Was it your intention to be with him and provide him that support and advice had it been needed had you been in the room?

A Yes. I would have stopped him from talking if they asked him that kind of a question. That was not my understanding of what they were doing there. I thought they were trying to find out what happened, what actually happened.

Q I notice in the transcript you told him that you didn't like secrets. You were reluctant to leave.

A That's true. They had lied to me so many times. They had tricked me. I felt intimidated. I felt helpless. I tried to seek counsel from friends, from people. I couldn't find anyone to help me.

Q He told you that you had seen too many movies, didn't he?

A Yes, he did. He told me that type of thing only happens in movies. They wouldn't lie. They wouldn't try to trick Shawn. He promised me that he was concerned, that he cared about Shawn and what happened to him. I believed what he told me.

Q All right. One moment, Mrs. Novak. At the second interview, Mrs. Novak, Detective Hoffman was present?

A Yes, I believe he was.

Q Did he promise you at that time or throughout these interrogations of your son that no questions would be asked about the murder of your son?

A Let me think back to the second interview.

Q That you should not worry.

A My mind is blank.

MR. HUMPHREYS: If Mr. Brydges wants to testify.

MR. BRYDGES: Can we have just a moment, Your Honor?

BY MR. BRYDGES:

Q Do you need some water or anything, Jenny?

A No. I'm fine.

Q If you recall. I just want what you recall.

A He told me at the second interview that he wanted to go over the things that Shawn had told him the first night, where he had been, that possibly he had seen somebody enter that wooded area. They told me there was a discrepancy about the names of the people in the search party. Shawn was in the search party. They had told me that Shawn's name was not on that list when, in fact, it was. They told each of his friends the same thing, their names weren't on that list when, in fact, they were. They had signed the list together.

Q Did you find out subsequent to your son's alleged confession that they had lied to him throughout those interviews?

MR. HUMPHREYS: Objection. That's based on hearsay, Your Honor.

THE COURT: Sustain the objection.

BY MR. BRYDGES:
Q Do you know whether they lied to him or not?

MR. HUMPHREYS: Objection, Your Honor. That's speculation.

MR. BRYDGES: If she knows.

THE COURT: How's she going to know?

MR. BRYDGES: Let's find out, Your Honor.

BY MR. BRYDGES:
Q Do you know whether they lied to him or not?

THE COURT: Sustain the objection.

A I believe they did.

MR. HUMPHREYS: Objection.

BY MR. BRYDGES:
Q Not what you believe. Did the officers tell you they lied to him?
A Yes, they did. In fact, they did tell me that. No, I take that back. They didn't tell me they lied. hey lied to me also. They told me his name wasn't on the list.

MR. HUMPHREYS: Objection, Your Honor. That's not a responsive answer.

MR. BRYDGES: Answer Mr. Humphreys.

CROSS-EXAMINATION

BY MR. HUMPHREYS:

Q Mrs. Novak, the interviews that you testified to again on Wednesday -- I think you testified there was one at your house apparently on Wednesday during the day and then later Wednesday night, then again Thursday and Thursday night. You testified about those four interviews?

A Wednesday evening at my house, Wednesday evening at the police station, Thursday afternoon at my house when Shawn got out of school, Thursday evening at the police station.

Q After each one of those interviews your son was released. He was not restrained in any way, he wasn't in jail. He wasn't handcuffed. He was returned to you and your family at home after each of those interviews, wasn't he?

A Yes, he was.

Q On each occasion if I understood your testimony correctly, the police detectives -- one or another police detective -- called you or made an effort to get in contact with you prior to conducting any interview with your son, correct?

A They were with my son when they called.

Q I understand that. They did call and ask you if they could speak to him about this case, didn't they?

A Yes, they did.

Q Each of those occasions you granted your permission, didn't you?

A I tried to deny it. Yes, I did eventually grant it after they insisted.

Q You were indeed present during some of those interviews with your son, weren't you?

A No, I was not.

Q During some of them?

A Not during those interviews.

Q I thought you testified that you came down on Thursday night to police headquarters?

A I was at the police headquarters. They did not allow me to be with him during the interview. They left me in the waiting room.

Q During no part of that interview were you with your son?

A No, I wasn't.

Q Now, let's talk about Saturday. If I understood you correctly, you were supposed to originally go down there on Friday night with Shawn because they wanted to talk to him about the case. You couldn't make it. You couldn't find a sitter. So you made arrangements to go down Saturday morning; is that correct?

A Yes.

Q Now, before I go any further, let me ask if you can identify your son's handwriting. Do you recognize your son's signature at the bottom of this document?

A Looks like his.

Q When Detective Hoffman talked to you that Saturday morning, he told you that they wanted to get some more details from your son about his knowledge, whatever it may be, about this case. Isn't that pretty much what he said?

A Yes.

Q You indicated that you wanted to be present during the interview?

A Yes.

Q You were indeed present for a rather lengthy period of time during the interview, weren't you, over an hour?

A About half of it.

Q At the point in time where Detective Hoffman asked you if he could speak to your son alone, didn't he tell you that he wanted to get into some sensitive areas and felt like your son would be more open with him if you weren't present in the room?

A Yes. I understood him to say that in relation to what his friends were doing. They might have been out somewhere sipping on a can of beer or something when they should have, in fact, been at home or whatever.

Q Let me read to you a statement and see if this refreshes your recollection. Do you recall Detective Hoffman saying to you, there are a couple of sensitive areas not dealing with these kids but dealing with a few things I want to ask him about. I need to know. I need to, you know -- I want to have your permission. Why don't you ask him, not in my presence and talk to him for a second. Okay. That way maybe you'll feel comfortable. Do you remember him telling you that -- Detective Hoffman?

A Yes. Sensitive areas not dealing with the children and what had happened. He was talking about --

Q My question is

MR. BRYDGES: Let her finish.

THE COURT: Let her finish the answer.

BY MR. HUMPHREYS:

Q Do you remember Detective Hoffman then leaving you alone with your son so you could discuss whether or not you were going to continue to be present in the room with him?

A Yes.

Q You discussed that with your son. Based on that discussion, you agreed to wait outside in the lobby for the rest of the interview; isn't that correct?

A That's correct.

Q Now, as far as Mr. Brydges' question about when you indicated-- let me rephrase it. There came a point, Mrs. Novak, when a detective -- I think you may have said Detective Tucker. If I'm not correct about that, please forgive me. Came out to you and said, You're not going to want to hear this, but Shawn or your son said that he did it. Is that your recollection?

A (The witness nodded affirmatively.)

Q It was shortly after this that you told somebody on the police department -- I don't know if you testified as to who this would have been. You didn't want the police to talk to your son any longer.

A I believe it was Detective Price.

Q Detective Price. As far as you know, you don't have any way of knowing as you sit here today whether or not they continued to speak to your son after you made that decision, do you?

A Detective Price's statement to me wasn't correct and honest. Then they, according to that transcript that you have, continued to question him after I told them not to.

Q How do you know at what point they interrupted the questioning of your son?

A Because I asked him, What did he say? He said, he simply said, I did it, out of the blue. They were not even questioning him about it. Out of the blue he just piped up and said, I did it.

Q You have no way of knowing what was going on in the interview room while you were having this discussion with Detective Price or while you were wrestling in your own mind with the decision you ultimately made that you communicated to the police that you didn't want them to question your son any further, do you?

A I could not know. I was not there.

Q Exactly. Now, you were in the interview room with your son during the early part of the interview. Wouln't

it be fair to say that your son was pretty much at ease with himself? He was not angry or upset about being there. Indeed, he was being cooperative with the police and answering their questions, was he not?

A Yes, he was. He wanted to help.

Q Your son has no difficulty in his communication skills, does he?

A No.

Q You're aware I'm sure as his mother of his fine grades at Virginia Beach Jr. High School and that he got a C In honor's English. Were you aware of that?

A Yes.

Q And your son scored very highly on the Missouri mastery and achievement test. He got a 95 percentile on his reading skills and a 99 percentile in language skills. Are you aware of that?

A Yes.

Q Do you know of your own knowledge what prompted that first interview between your son and the detectives that occurred at your home when they placed that call?

A The detectives told me that it was a door-to-door canvassing of the neighborhood. They were speaking to every single person in the neighborhood.

Q Would you be surprised to learn that your son had made a call to the hot line that was set up to gather information about these murders of these two young children? Would it surprise you to learn that the first visit was as a result of a call your son made to that hot line?

A At this point, it would not surprise me. He had a teacher that told him to call. So he called. At that time I did not know he had called the hot line.

Q Do I gather from your testimony that until just now you weren't aware that your son made that call to the hot line?

A I was aware of it before now. I was not aware of

it on Wednesday or whatever it was.

MR. HUMPHREYS: That's all I have, Your Honor.

THE COURT: Anything further?

MR. BRYDGES: Yes, Your Honor. I have one question.

REDIRECT EXAMINATION

BY MR. BRYDGES:

Q Mrs. Novak, Mr. Humphreys asked you when you were asked to leave the room on the day of the alleged confession that Mr. Hoffman said to you, he quoted, There's a couple of sensitive areas not dealing with the murdered kids.

A Yes.

Q Was it based upon that statement to you that you allowed Shawn to be there by himself?

A That and the fact that he had already promised me that he was going to talk to him about what his friends were doing.

Q Did you have any conception that these officers were going to talk to your son about accusing him or trying to get him to confess to this crime when you left that room?

A No, sir.

Q In the language skills and other subjects that he was given fairly good marks, the teachers don't lie to him those?

MR. HUMPHREYS: Objection. She wouldn't know that, Your Honor.

MR. BRYDGES: That's all I have, Your Honor. Wait a minute. one more.

THE COURT: Anything further?

MR. HUMPHREYS: No, sir.

THE COURT: You can step down.

MR. BRYDGES: Just one more thing, Your Honor.

BY MR. BRYDGES:
Q When you saw him, Mrs. Novak, after the alleged confession, what was his condition?
A Shawn's -- he was sitting in the room. He was just sitting there crying.
Q Was he crying?
A He was crying. He was not saying anything. He was not moving. He stood up and hugged me when I came into the room. I just prayed with him.

MR. BRYDGES: Thank you, Mrs. Novak.

----oOo----

MR. BRYDGES: Your Honor, that is sufficient foundation for the court to read the transcript. I think the burden at this point shifts to the Commonwealth. I'll be happy to go through that.

MR. HUMPHREYS: I don't have a problem with putting the transcript into evidence at this point, Your Honor, and also the rights form.

THE COURT: I think it goes without saying that the Commonwealth under law has the burden of proving that the statement or confession was voluntary by preponderance of the evidence and raise the threshold to do that. We always get into this dilemma of who's going to go forward with testimony.

MR. BRYDGES: I have no objection.

THE COURT: I have constantly asked the Commonwealth as well as the defendant to put on all the evidence they have on these issues because I don't think the court can make a fair determination unless it has that evidence that it was voluntary.

MR. BRYDGES: Would you like for me to proceed with Detective Hoffman? I'll be glad to do it.
THE COURT: That's fine.

MR. HUMPHREYS: That's fine, Your Honor.

THE COURT: The evidence has to come in one fashion or the other.

MR. BRYDGES: We call Detective Hoffman then. (Mr. Hoffman was sworn.)

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SEAN W. HOFFMAN, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRYDGES:

Q Detective Hoffman, would you give us your full name for the record, please.

A Detective S. W. Hoffman.

Q You are a detective on the Virginia Beach Police Department?

A That's correct.

Q Having served in that capacity how many years?

A Approximately ten.

Q Were you assigned to the investigation of this particular matter?
A Yes, I was.
Q When were you assigned to the investigation?
A On 3-5-91, 1 believe the day the children were found.

Q The same day that the bodies were found?
A Yes, sir.
Q Was it that night that you went to the Novak home?
A No, sir.
Q What night -- you didn't go the first night. Someone went the first night. Do you know who that was?
A I believe it was Detective Hoover.
Q When was your first contact with Mrs. Novak who just testified here?
A My first contact with Mrs. Novak would have been Saturday, I believe 3-9-91.
Q Saturday evening?
A Saturday morning.
Q Was there a subsequent interview on Saturday night?
A No, sir.
Q So Saturday morning was the time that you obtained the confession, which is the subject of this suppression hearing?
A That is correct.
Q Had you not been there at any other time with Shawn while his mother was there in the lobby? How about the day before?
A No, sir.
Q You only interviewed Shawn on the one occasion?
A No. That's not correct. I interviewed him on two occasions.
Q What occasions were they, Detective Hoffman?

A I interviewed him on 3-7-91 in the evening hours. I also interviewed him on the morning of 3-9-91.

Q The 7th you had him in there. Was Mrs. Novak with him at that time?

A No, sir.

Q Where was she?

A I'm not sure where Mrs. Novak was.

Q Did she come to headquarters with him?

A I don't have any knowledge of that either.

Q Who was it that asked her to wait in the other room?

A I imagine it was another detective.

Q You were not present at that time?

A No, sir, I was not.

Q Calling your attention to Saturday morning when the statements were made. Did she bring him down that morning?

A Yes, she did.

Q Did she ask to come in the interview room with him?

A She came back in the detective bay area, which is a large open area and was with him.

Q Where were you interviewing him at that time, Detective Hoffman?

A I was interviewing him in one of the interview rooms.

Q Was she in there with you?

A Yes, she was.

Q During the course of the interview -- all of this was taped by the way and videoed, was it not?

A Yes, sir, it was.

Q No secrets about what went on in there. His Honor can read it, see it, or look at it.

A Yes, sir.

Q There came a time when you asked that she leave. Am I correct?

A No, sir. I didn't ask if she would leave.

Q What did you say to her?
A I asked her if it would be okay if I talked to Shawn alone.
Q What did she say?
A At that point, I told her if she would talk with Shawn and see if it was okay. I would give them a few minutes by themselves. She asked Shawn one question in my presence before I left the room. That was how he felt about t.
Q Do you recall her saying to him, Well, I'll leave, but don't freak out now. I'm concerned about your doing something you shouldn't do. Do you remember her saying that to him?
A I believe she asked Shawn if he was going to be okay, if he was not going to freak out. He replied something to the effect that he would be okay.
Q At the time she departed, did you not tell her, Detective Hoffman, that there was not going be any interrogation of any kind about the murdered boys?
A I said something to the effect --
Q Let me quote it to you. I think we have it since you don't have a copy of the transcript.
A Page 37. 1 have it here.
Q Can you read it to me -- a couple sensitive areas at the bottom of Page 37?
A There's a couple of sensitive areas not dealing with the kids.
Q What did you mean by, not dealing with the kids -- the two murdered boys?
A Yes, sir.
Q So when she left the room, it's a fair statement, isn't it, Detective Hoffman, that she did not think you were going to interrogate him about the murdered boys?
A I guess that's what she thought at that point.
Q But you did, didn't you?
A Pardon me?
Q You did, didn't you?

A Later on, yes, I did.

Q At the time you decided to later on interrogate him about the murdered boys, did you feel it incumbent upon you to go get his mother?

A He had gone out to see his mother at one point. He spoke with her alone without me present there. We had not been dealing with anything as far as some of the questions that I asked him.

Q Well, Detective Hoffman, the mother had manifested throughout all of these interviews that you attended and some of the other officers attended that she wanted to be with him because she was his only parent. His father was not in the area. She felt very sensitive about being there. You knew that. Didn't you know that?

A Yes, sir. She said that she was a responsible parent. The husband was out of the area.

Q So when your questioning -- which I'm not going to go over with you because His Honor can read it. When it became apparent that you were telling him that you had fingerprints off of one of the youngster's jackets -- didn't you tell him that?

A Yes, I did.

Q Some special laser fingerprints. That was a lie, wasn't it?

A Yes, it was.

Q You told him that you also had a witness that saw him with the boys. That was a lie?

A That is correct.

Q During the times that you were telling him these things, was that not for the purpose of getting him to make a confession?

A No, sir. I was trying to find out at that point if he was actually a suspect in the case. I had not narrowed down on him as an actual suspect in this case.

Q When you tell somebody you got fingerprints off of a jacket so he must have touched the bodies of the

children, is that not an accusatory phase?

A I'm not sure if it was accusatory or not. It was a ruse that I pulled at that particular point to find out what his answer was going to be.

Q Well, you're not concerned, Detective Hoffman, that if Mrs. Novak was in the room that she would have said, no more questions. I'm going to call counsel. That's what you wanted to avoid when you put her out, wasn't it?

A No. That's not particularly true.

Q What do you mean, particularly true?

MR. HUMPHREYS: Let the witness answer, please.

THE COURT: Let him answer. You're asking questions. They're long. They're leading, which is fine, but you've got to give him a chance to answer.

MR. BRYDGES: I apologize to the court.

A There were numerous other areas that I would have liked to have explored with Shawn depending on where we went as far as several of the ruses. Number one, some of those dealt with the boys that he hung around with, what they were doing, what they may have told him, what their habits were, their games that played, exploring those.

Q On Page 30 of the transcript -- I think you were conducting that interview too -- Mrs. Novak says, I'll wait out here in the lobby for you if want to talk by yourself. She told Shawn that. If you think that's okay, then I'll wait. You tried to get her at that time to go home and do chores and not even be there, didn't you?

A What I did is I explained to her that it may be a lengthy interview. If she had things to do, I understood and that I would bring her son home personally, that no one else would bring him home.

Q Suppose, Detective Hoffman, during the time that she was out doing chores you had asked the series of

questions that the court will read later on that led to this alleged confession. Would you not have wanted her available to advise her son?

A I'm sorry. You're going have to repeat that one.

Q When you asked that she go and leave police headquarters and do chores, knowing how she felt about being here with her son and also knowing that she refused to go and do chores and stayed there, did you not feel that had she gone and he began to get into sensitive areas, she would not be available to advise her son? Did that worry you any?

A I don't think she could have advised her son at all if she had been in the room. At that particular point, I wasn't dealing with any of those areas or any of those ruses. I didn't know I was going to do that until later while questioning Shawn.

Q Well, you got into the area of your fingerprints are on the jacket because we've got laser fingerprints. We've got a witness that saw you with the kids. All of those statements would appear to me to be indicating that you didn't think he was telling the truth about his participation in the events of that of the 5th.

A That is correct.

Q Did you not feel when you got to that phase of it that his mother ought to be in the room to say to him, time out Shawn, don't answer any questions?

A No, sir, I did not.

Q You did not think that was true, but you thought it would be more comfortable for you to examine this youngster with his mother out of the room?

Q I'm not sure it was more comfortable for me. Again, we went back into the area where I told her that I wanted to speak with her son about numerous other things involving other children, their habits. That's what I was going to explore at that point.

Q Wasn't the whole purpose of having her out of there so you could have freer access to this young man

and the statement that he was making to you that you thought the mother might stop him and say, don't answer any more questions? That bothered you, didn't it?

A No, sir, not exactly.

Q Then why did you --

MR. HUMPHREYS: Still answering.

MR. BRYDGES: Excuse me, Your Honor. I didn't know he hadn't finish.

A Again, initially it was for Shawn to answer the questions about the children -- not the kids, but his friends.

BY MR. BRYDGES:

Q But you weren't asking him about the other children when you were telling him you had his fingerprints and an eyewitness that saw him with the boys before their death.

A No, sir, I was not.

Q Didn't you think at that time you should have gotten his mother?

A No, sir.

Q You didn't think so. Even though she was within arm's reach of him?

A That's correct.

Q Now, after you finally said to him -- I don't know which page it's on, but the court can read it -- come on out and tell me you did it. You might as well tell me you did it. He said, Yes, I did. Then there was a knock on the door. That was Detective Vanderheiden I believe, right?

A That's not exactly what occurred.

Q You tell me what took place. Somebody knocked?

A I didn't ask Shawn to come on and tell me that

you did it.

Q What did you say to him?

A We went through questioning. I told him he could talk with me and not to be afraid. I said, Something happened and it went too far. I said something just happened. He said, Yes. At that point, I said, You killed them, didn't you. He made no audible response but moved his head in an up and down fashion.

Q At that phase -- you had led up to that particular question, didn't you, by almost a two-hour interview?

A Yes, sir.

Q All right. Now, at no time did you feel in your capacity as a police officer that this sixteen-year old's mother should be with him during those sensitive questions?

A No, I did not. She had already given Permission for me to talk with him.

Q Who knocked on the door at the time he said, All right, I did it?

A Sergeant Vanderheiden.

Q He told you that you've got to advise him of his rights?

A We went outside and had a conversation outside the interview room.

Q At that time after he said, All right, I did it, then you advised him of his rights?

A That's correct.

Q For the first time?

A Yes, sir.

Q Already had his confession?

A No, sir. I had an admission at that point.

Q And then you questioned him thereafter, didn't you?

A Yes, I did.

Q Did you advise him to have his mother come in and advise him about counsel?

A I asked him if he wanted me to have someone tell his mother or wait. He said, I'd like someone to tell my mother.

Q How about counsel? Did he want to speak to his mother about whether she should have a lawyer there or not?

A Mr. Brydges, I advised him of his Miranda rights.

MR. BRYDGES: He's sixteen years old. His mother was there. That's all I have, Your Honor.

CROSS-EXAMINATION

BY MR. HUMPHREYS:

Q Detective Hoffman, is this the form you just referred to?

A Yes, sir.

Q Does this appear to be your signature as well as Shawn Novak's?

A That is correct.

MR. HUMPHREYS: I would offer this as an exhibit in the case.

THE COURT: A copy of the advisement of rights form identified by the witness will be admitted as Commonwealth's Exhibit 1 for purposes of the motion to suppress.

(Marked in evidence by the court as Commonwealth's Exhibit Number 1.)

MR. HUMPHREYS: Thank you, Your Honor.

BY MR. HUMPHREYS:

Q Detective Hoffman, when Shawn Novak arrived for that interview at approximately between eight and nine

o'clock that Saturday morning, did you have the idea when he walked in the front door that you were going to arrest him?

A No, sir.

Q What was your purpose for asking Mr. Novak to be brought down for another interview with you?

A To go over all the information, number one, if he saw anything. What his participation was in the search, maybe what some of his friends may have told him, what they may have said to him, if there were any secrets that he was hiding concerning what someone may have told him.

Q Now, during the portion of the interview with Mr. Novak's mother present, what was your line of questioning generally?

A It was all concerning his daily events of Monday.

Q And why were you pursuing that particular line of questioning?

A That's the day the children had disappeared.

Q Then there came a point in time I believe when you suggested to Mrs. Novak that you wanted to explore some sensitive areas?

A That is correct.

Q What sensitive areas did you want to explore?

A Mainly dealing with his friends.

Q You've been a police officer for how long?

A Ten years.

Q How long have you been a detective?

A Approximately seven and a half.

Q Is it fair to say that some suspects tend to be more open when they don't have loved ones or members of their immediate family present?

A Certainly.

Q Did you feel at that point that maybe something was being held back or there might be some more information in Shawn's head that he wasn't conveying because of his mother's presence?

A Yes, I did.
Q Now, when Mrs. Novak left the room, what line of questioning did you pursue at that point in general?

THE COURT: What are we talking about, Saturday?

MR. HUMPHREYS: Saturday. I'm sorry. It's the same interview, Your Honor.

A We began talking about his daily events of Tuesday.

BY MR. HUMPHREYS:
Q So you went from Monday. Now you're on Tuesday?
A That's correct.
Q At this point let me focus your attention on the part where Mrs. Novak left the room. At that point, was Shawn Novak under arrest?
A No, he was not.
Q Did you have any idea at that point that you were going to arrest him for this offense?
A No, I did not.
Q Now, would it be fair to say that you then proceeded through the balance of the week with his activities up until the point in time he arrived in your office there?
A Yes, sir.
Q Now, when you got to that point, you testified in response to Mr. Brydges that you used what you described as one or more ruses to get a reaction from Mr. Novak.
A Yes, I did.
Q Had he -- let me back up and ask it this way. One of the statements that Mr. Brydges asked you about concerned finding laser fingerprints or lasering I guess the body or the articles of clothing on the bodies and

recovering Mr. Novak's fingerprints. Tell the court how that conversation occurred.

A During the events of Tuesday, I knew certain things had been told to me by individuals that were with him in the search. During my questioning of Shawn, he did not relay these certain facts to me. I was unsure at that particular point if he was a suspect or not. I presented these ruses to him to elicit some type of answer that would lead me to believe either he was a suspect or not.

Q What if he got very indignant and vehemently denied any touching of either these children's bodies? Would that have been a typical reaction to one of your questions?

A That would have led me to believe, possibly believe, at that point that he didn't have anything to do with it. I knew that I was going to probably try two or three ruses on him at that particular point.

Q Would it be fair to say that you were trying to judge whether he was holding something back by his reaction to these questions with this fictitious information you were giving him?

A Yes, sir.

Q Did he react in a way you expected him to react to that question?

A No. He reacted in almost -- he gave me a response of someone that was hiding something from me.

Q You formulated another ruse?

A Yes, I did.

Q What was that?

A That was concerning that someone had seen him in the area of the woods -- not in the woods but in the area of the lake near the woods -- with the children on Monday Afternoon.

Q Did he give you the expected reaction that you might have expected from someone whose not a suspect in the case from that question?

A That particular point we went over for probably five or ten minutes. He initially stated that, no, he was not there. After a little bit more questioning he said he may have been there.

Q I won't belabor this point, but would it be fair that you asked him a number of these questions, which ultimately led up to what you testified to with the statement you made to the effect; You did this, didn't you, or words to that effect?

A Yes, sir.

Q About how long, just approximately, did that particular line of questioning last?

A As far as the ruses were concerned, somewhere in the area -- I believe we began around 10:58, 10:50 maybe. I took a break at 11:18.

Q The rights form, which is a Commonwealth's exhibit in the hearing, is filled out as 12:45. Is that your understanding of when you advised him of his rights?

A Yes, sir.

Q Now, prior to the admissions that Mr. Novak made, had you during the course of this latter extensive interview taken breaks?

A Yes, I did.

Q During the course of those breaks, was Mr. Novak free to roam around the headquarters building? Was he fed? Did he get anything to drink at any point?

A Yes. He was out in the bay area talking with several other detectives. He went out into the lobby area at a particular point to be by himself with his mother. I left their presence. As a matter of fact, several of the times I was not even present with Shawn. He was by himself.

Q Would it be fair to say that when it came time to take a break and to resume your questioning, you would go looking for him and bring him back in the room from wherever he happened to be?

A Yes, sir.

Q Now, at the point in time when Mr. Novak apparently answered your question to the effect that he did this with the nod of his head, it was shortly after that you stepped out of the room and had a discussion with Sergeant Vanderheiden and then came back into the room and advised Mr. Novak of his so-called Miranda rights. Is that what happened?

A That is correct.

Q After Mr. Novak executed the rights form, did you continue to question him?

A Yes, I did.

Q Did there come a point in time when your interview with Mr. Novak was abruptly terminated by another detective?

A Yes, it was.

Q Did you learn what the purpose for the termination of the interview was?

A Yes. Mrs. Novak had requested that a lawyer be present before any further questioning of her son.

Was it at that point that you totally ceased any further interrogation of Mr. Novak?

A Immediately.

MR. HUMPHREYS: Thank you, Detective Hoffman. That's all I have.

REDIRECT EXAMINATION

BY MR. BRYDGES:

Q Detective Hoffman, why was it necessary for another officer to come in and tell you to stop questioning someone after you had gotten a partial confession or an admission, if you will? Didn't you know better on your own that you should advise him that he had a right to have his mother come in and somebody advise him about his counsel, Fifth

Amendment?

MR. HUMPHREYS: Your Honor, the witness is being asked for a legal conclusion.

MR. BRYDGES: He's got ten years' experience, Your Honor.

MR. HUMPHREYS: I don't think he's got a law degree.

THE COURT: It's still a legal question.

BY MR. BRYDGES:

Q At what point in time did you feel it was necessary to assure Mr. Novak that he had the right to legal counsel?

A At the point he said that he had killed them.

Q You didn't think that it was necessary for his mother to be there?

A At that point, I did not.

Q You knew he was sixteen?

A Yes, I did.

Q Now, would you say that he as an interviewee, if you will, he was pretty pliable, that you could get him to pretty much say whatever you wanted?

A No, not really.

Q Well, he told you first when you asked him if he touched these boys' clothing, that he did not. You said, Well, Shawn that's not -- this is early on in the interview after the mother left the room. That can't be true because we've got your fingerprints on it.

A Yes, sir.

Q Then he said, Well, maybe I did then. I don't think so. He kept saying that, didn't he?

A That's correct.

Q Then you said, Well, fingerprints don't lie, things like

that. Wouldn't you say that at that phase that you were getting pretty accusatory?

A I don't believe it was accusatory at that point.

Q Then you said in addition to that, You went into the woods with them. We've got a witness that says that they saw you in the woods with them. He said, No, nobody could have seen me in the woods with them. Yes, we've got the witness. How are you going to get around that? He was pliable enough to say to you, Well, okay, maybe I did walk a little ways, at your suggestion.

A I'm sorry. It was around the lake area near the woods.

Q Well, he denied it?

A There was a possibility that he may have walked with them. He only walked with them near the lake.

Q He said he hadn't walked with them at all in the beginning. Then you came up with the ruse witness?

A Yes.

Q Then you said, trying to explain the fingerprints -- the nonexistent fingerprints on the jacket -- well, maybe you found them, Mr. Novak, before anybody else and touched them then. Didn't you suggest that to him?

A At one particular point, yes.

Q That was a whole new scenario that you made up, that maybe he found the bodies himself and touched them. He went along with that too, didn't he?

A That was after several ruses before.

Q And you're telling the court that none of this was accusatory?

A No, sir.

Q Anybody else confess to this?

A No, sir.

MR. BRYDGES: Thank you, Mr. Hoffman.

MR. HUMPHREYS: That's all I have, Your Honor.

THE COURT: Detective, let me just ask you a couple of questions. Mr. Humphreys asked a question earlier to Mrs. Novak about possibly a phone call that Shawn Novak made to the hot line. Do you have any knowledge of that?

THE WITNESS: I was not there when the phone call was made. I had been advised that he made the phone call. That's why the detective went over to their house because of his statements to the hot line operator.

THE COURT: You were assigned to the investigation on Monday?

THE WITNESS: Yes, sir.

THE COURT: Can you just tell me a little bit about how the investigation was being conducted?

THE WITNESS: I was assigned as a case detective. I was assigned an assistant basically to put together the files. There was approximately twenty to twenty-five detectives assigned to the case also. There were in addition, two operators that manned a hot line that we put out in the news media for any information that anyone had about the children. All that information that was generated would come across my desk in the form of a tip. I then read that tip, initialed the tip, and would later discuss it with the supervisor what tips we needed to go out on and investigate further.

THE COURT: How many tips did you get over this hot line in the course of that week's time?

THE WITNESS: Two hundred or three hundred tips.

THE COURT: Did you send out a police officer or

detective to investigate all of those?

THE WITNESS: Not all of them. We tried to take the most reliable ones that we could, the ones that we felt had something to do with the children. We received such tips as, I saw the children in California Tuesday afternoon. We knew that couldn't be possible. Then we would receive another tip that, I think my son is involved because of this reason. Those tips we would try to get to first. It was our plan to eventually, if we had to, go back and interview every one of those tips.

THE COURT: Can you give me an approximation of how many people you interviewed during the course of that week from Monday through Saturday morning?

THE WITNESS: As far as the people assigned or just me personally?

THE COURT: Both.

THE WITNESS: Me personally, probably ten people. The investigators assigned, there were maybe sixty interviews.

THE COURT: How was that conducted generally?

THE WITNESS: Generally, they were conducted by person to person.

THE COURT: At home or in schools or in the police department?

THE WITNESS: I conducted half of those interviews at the police department on numerous occasions with the same individuals.

THE COURT: Okay. You said you conducted about ten.

THE WITNESS: Yes, sir.

THE COURT: Had any of these involved people who lived out in the area of the crime scene?

THE WITNESS: Yes, sir.

THE COURT: And how many were conducted in the police department?

THE WITNESS: I conducted personally about five.

THE COURT: Any of them juveniles?

THE WITNESS: Yes, sir.

THE COURT: How many of them?

THE WITNESS: Probably four.

THE COURT: How about the adults?

THE WITNESS: Probably one.

THE COURT: How about the other five interviews you conducted?

THE WITNESS: Mainly individuals out in the neighborhood, schoolmates that went to First Colonial High School. Some of those were done at the bureau. Some of them were done in person going to their homes.

THE COURT: Did you partake of any of this door-to-door interview in neighborhoods that's been referred to in the testimony?

THE WITNESS: I'm not sure how to answer that. I did go out the first night and interview three individuals that had been playing in the woods Tuesday afternoon when the children were found. There was a neighborhood canvas that's going on at that point. I did partake in that, but I did not go door to door. I had specific people that I was going to ask questions.

THE COURT: Any suspects at all during this week?

THE WITNESS: Not really suspects. There were several individuals that I interviewed that were friends of Shawn that had said some things that almost led me to believe they may have been involved at one point. No, there was not anyone that I had focused on solely.

THE COURT: At any time prior to the interview on

Saturday morning with Shawn, was he a suspect?

THE WITNESS: No, sir.

THE COURT: Was he ever in custody or not free to leave?

THE WITNESS: No, sir.

THE COURT: Had the investigation focused on him at that point on Saturday morning?

THE WITNESS: No, sir.

THE COURT: Interview anybody else on Saturday morning?

THE WITNESS: No, sir, I did not.

THE COURT: How about Friday?

THE WITNESS: I believe there was an interview conducted on Friday with a friend of Mr. Novak's.

THE COURT: Where was that?

THE WITNESS: It was conducted at Police headquarters.

THE COURT: Any other questions of the Commonwealth?

MR. HUMPHREYS: No, Your Honor.

MR. BRYDGES: One moment, Your Honor.

BY MR. BRYDGES:

Q Do you recall testifying before Judge Aucamp on April 25,1991, in the juvenile and domestic relations court?

A Yes, I do.

Q Do you recall Mr. Daugherty, who was then the pubic defender, asking you this question on Page 57. It is true, is it not, Detective Hoffman, when the defendant made certain contradictory statements he became a suspect? You said, After several statements that were contradicted to the witness statement, yes, he did become a suspect in my mind. That was early on in the interview, wasn't it?

A That was approximately three quarters of the way through the interview.

Q Now, then at that point, he became the focus of our investigation? You said, Yes. At that point he became suspect? You indicated, Yes, sir. You had no other suspects? I had a whole bunch of suspects at that time. At that time in your mind, three quarters or maybe halfway, he was a suspect?

A He became very suspicious in his answers.

Q Your questions thereafter were directed in an accusatory manner or you were basically accusing him?

A At one particular point was when I asked him, Did you kill them?

Q Before that when you were -- all these contradictions about his fingerprints, no fingerprints, did you find the bodies before, did somebody see you or not see you. Those are contradictory statements that he's making to you.

A They were statements that I was using as a ruse in there to try to elicit some type of response that would lead me to believe that Mr. Novak was a suspect or not.

Q In answer to Mr. Daugherty's questions you said, At that point in time when the contradictions occurred, he was a suspect. With those answers that he gave me,

they were certainly suspicious to me?

A Yes, sir.

Q Did you advise him when he became a suspect and these remarks were made, that the court will read shortly, that he should have been advised of his Miranda rights?

A I advised him of his Miranda rights when he made the statement he did kill them.

Q The court probably has been in your interview room. Can you describe it for me just a little bit? How big s your interrogation room with the one-way glass?

A An eight-by-seven room maybe.

Q When you go in there and close the door, does the door lock?

A No, sir.

Q Does not. Where were you sitting with relation to when you were alone with him?

A I was sitting in front of him.

Q In addition to the video camera, was he being observed all the time from the outside?

A In addition to the video camera, there was someone in the video room.

Q Watching his movements and listening to your questions?

A That is correct.

Q What sort of light is in the interrogation room?

A There's two fluorescent lights in there.

Q Who was sitting closest to the door? You or the defendant?

A Probably me.

Q After he made his first statement, All right, I did it, did he say he wanted his mother?

A No, he did not.

Q Sure of that?

A Yes, sir.

Q On Page 102 of the interview you say, Sign your

name right here, and he apparently does. You said, You want me to tell her or do you want me to wait? He said, Let her know.

A Yes, sir.

Q Did you let her know?

A Yes, sir.

Q When?

A I had one of the detectives go out to her.

Q Do you know who?

A I believe it was Sergeant Vanderheiden and maybe Detective Price at that point.

MR. BRYDGES: All right. Thank you. That's all I have.

MR. HUMPHREYS: Just one other question.

RECROSS-EXAMINATION

BY MR. HUMPHREYS:

Q Detective Hoffman, would you just generally describe for the court what Mr. Novak's demeanor during the course of this interview was and describe how it changed through the course of the interview.

A Three quarters of the way through the interview he was very calm, conversational, jokingly at some points between myself and Mr. Novak.

Q He smiled at a couple of points, laughed at a couple of points. You made small talk at several points, during the interview?

A Yes, sir.

Q At what point, if ever, did his demeanor change?

A It changed at the particular point when I told him that I knew that he had not touched those children. At that point he dropped his head down, and I asked him what had happened. If maybe it was just an

accident or something had gone too far. He had a brief period
of time for about five minutes and sat there and smoked a cigarette. Then he told me that he had killed them.

Q His mother testified that when she went in to see him, he was crying. Did there come a time when he began to cry during your interview with him?

A After he was advised of his rights, I asked him what had occurred. He began telling me what had occurred. At the conclusion when Sergeant Vanderheiden knocked on the door and told me the interview was going to have to stop, Shawn was teary eyed at that point.

MR. HUMPHREYS: That's all I have.

REDIRECT EXAMINATION

BY MR. BRYDGES:

Q Detective Hoffman, you had him right to the point by joshing him along and telling jokes with him --

A No, sir.

Q -- to relax him to make you one of the boys?

A I'm sure he was relaxed. I was relaxed at that point myself.

Q You kept telling him, You're a pretty smart kid. You're pretty cool. That's part of what you do with kids when you're bringing them along, isn't it, to relax them?

A Well, he was in a relaxed state. I'm not sure exactly what you're asking me.

Q I note in the transcript and the court will read this too, You're a pretty cool guy. This is a pretty cool thing. This kind of thing. That was the kind of conversation you were having with him?

A I was trying to make it a normal atmosphere or as

normal as possible.

Q Is it a fair statement to say, Detective Hoffman, when you said, We know that your fingerprints weren't on there and you were telling him about the fact that the lies were lies, he dropped his head, right?

A Yes, sir.

Q You were pretty sure at that time he might say something incriminating, weren't you?

A I wasn't sure at that point what he was going to say.

Q Well, he waited five minutes with his head down.You had him right to the brink. Did it ever occur to you at that time to say, Shawn, let me get your mother and let me advise you of your rights?

A No, sir.

RECROSS-EXAMINATION

BY MR. HUMPHREYS:

Q Did you ever threaten him in any way?

A No, sir.

Q Coerced him in any way?

A No, sir.

Q Tell him he was going to be charged in any way if he didn't talk to you, anything like that?

A No, sir.

MR. HUMPHREYS: Thank you.

MR. BRYDGES: That's all we have, Your Honor.

THE COURT: Detective, let me just go back to the phone call. Did you document the phone call that apparently Shawn made to the hot line or information that was conveyed to the hot line by Shawn in that phone call?

THE WITNESS: Judge, I would have to go back in the file. There were a lot of notes. At the time that the phone call was made, I initialed the sheet if it did come in. I gave it to Detective Price. I was going through different phases. I was going out in the neighborhood and interviewing different people. Shawn at that particular point had really no bearing on me at all as far as what he had said in the phone conversation with the hot line operator. To answer you, I would have to go back in the file to find that. I know that his statement did lead to a detective going out to his household and interviewing him.

THE COURT: That was Wednesday night?

THE WITNESS: Yes, sir.

THE COURT: Or Wednesday day I guess?

THE WITNESS: Yes, sir. Conversation with that detective played no real key in this case at all.

THE COURT: Well, why did you ask him to come down on Friday night or Saturday morning if that didn't play a key?

THE WITNESS: After other interviews with friends of his.

MR. HUMPHREYS: Just to follow up on that.

BY MR. HUMPHREYS:

Q Would it be fair to say, Detective, that some of the information that you had generally gleaned from other witnesses and through other detectives interviewing other witnesses conflicted with some of the evidence you had been given from other interviews with Mr. Novak?

A That's correct.

Q That's why you wanted to bring him in, to clarify who was right and who was wrong and whether he had anymore involvement than what you thought at that point?

A Yes, sir.

MR. HUMPHREYS: Okay.

REDIRECT EXAMINATION

BY MR. BRYDGES:

Q Were those the contradictions that you told Mr. Daugherty about back on April 25th that made him a suspect?

A I'm not sure which contradictions you're talking about. I don't have that in front of me.

MR. BRYDGES: All right. Thank you.

THE COURT: Thank you, Detective.

Why don't we take a five-minute recess at this point.

(The hearing recessed at 12:05 p.m. At 12:11 p.m. the hearing continued as follows:)

THE COURT: Mr. Brydges, do you have any other witnesses you wish to call?

MR. BRYDGES: No, sir, Your Honor. I think that's the only witness we'll call.

THE COURT: Where's the defendant?

MR. BRYDGES: They're going to bring him in. Your Honor, we have a clean copy of the transcript that we've been alluding to. Mr. Humphreys informed me the back

page fell off.

MR. HUMPHREYS: Commonwealth will stipulate that's an accurate transcription of the videotape recorded interview between Detective Hoffman, Mrs. Novak, and the defendant, Shawn Novak.

MR. BRYDGES: Here, Your Honor, are the tapes.

THE COURT: All right.

MR. HUMPHREYS: Those are copies?

MR. BRYDGES: Those are our copies.

THE COURT: I'll go ahead and mark the transcript Commonwealth's Exhibit 2.

(Marked in evidence by the court as Commonwealth's Exhibit Number 2.)

THE COURT: The defendant doesn't have any additional testimony or witnesses. Does the Commonwealth?

MR. HUMPHREYS: No, Your Honor, we have none at this time.

MR. BRYDGES: If, Your Honor please, we have been provided in discovery several interviews conducted by Detective Hoover with other witnesses just preceding these interviews that have been alluded to here on the stand, which clearly indicate as far as we're concerned that this young man was a suspect. Our copies are marked up.

MR. HUMPHREYS: I would object anyway, Your

Honor. Detective Hoover -- they haven't put him on the stand. The defendant's mother has testified. The issue as I understand it is the admissibility of the statements made during the interview that occurred on Saturday the 9th of March. I'm at a loss to understand the relevance of interviews with Detective Hoover in a scenario where he was clearly not in custody. In other words, there's really no issue from the defense in testimony or evidence here today about Mr. Novak being in custody at any of the interviews that took place in his home on prior occasions when he was brought down to the detective bureau. I'm going to object to having a summary put into evidence at this point.

MR. BRYDGES: These are statements, Your Honor, of interviews conducted by Detective Hoffman and others zeroing in on Mr. Novak where the thrust of the questioning in these discovery material interviews are all about Mr. Novak and where he was and what he was doing. Did he touch these bodies, all of this stuff. They're telling you today with just a little bit of grist for the mill. These are all here.

THE COURT: You just had --

MR. BRYDGES: I can put him back. I didn't know there was going to be an objection to them, Your Honor.

THE COURT: Apparently, there is. I have to sustain the objection to these coming in.

MR. BRYDGES: Unless we lay a foundation?

THE COURT: You want to bring Detective Hoffman back and put him on the stand? That's fine or put on any other detectives. That's fine or the defendant.

MR. BRYDGES: We'll call him back then, your Honor.

THE COURT: Is he here?

MR. BRYDGES:. He's here. Is it all right if Mr. Mahan does this portion of it?

THE COURT: Fine.

BY MR. MAHAN:

Q Detective Hoffman, you were the detective in charge of this investigation I think you told us; is that right?

A Yes, sir

Q You told us and His Honor briefly before about how all of the materials that were being collected as a result of the investigation that was being carried out would come across your desk. You would review it, sign off on it so that you would be aware of what leads were being developed from everybody else that was assisting in the investigation; isn't that right?

A Yes, sir.

Q As a result of that, Detective Hoffman, all of the various interview summaries and so forth that were prepared by your colleagues -- those were the types of things that you were reviewing; isn't that correct?

A That is correct.

Q Let me show you --

MR. MAHAN: Judge, let me show them to the Commonwealth first and leaf through them and see what I have.

BY MR. MAHAN:

Q Detective Hoffman, let me show you if Imay, an investigative summary report and ask you if you can identify that.

A It appears to be one of the interviews conducted by one of the NIS agents.

Q Which agent?

A I believe it's Agent Ewell.

Q And what's the date of the interview that was conducted?

A March 8, 1991.

Q That's before the last time you interviewed Shawn Novak on March 9th?

A that's correct.

Q And this information you were aware of before you interviewed Mr. Novak on March 9th; isn't that correct?

A Yes, sir, briefly.

Q Let me show you another document apparently prepared by Agent Ewell. Can you identify that?

A Yes, sir. It appears to be an interview conducted by Agent Ewell with Jamey Allen.

Q The previous document I just showed you -- just so we're clear for the record -- is an interview with with who?

A That is with Ms. Berry.

Q Now, the second document I just showed you with Jamey Allen, that was an interview conducted when?

A That was conducted on March 8, 1991.

Q You also were aware of the gist of the information gleaned from that interview before you interrogated Mr. Novak on the 9th; isn't that true?

A Yes, sir.

Q Let me show you another document that appears to be dated March 7th, 1991. That reports to be the summary of an interview with Edna Lawrence, one of Mr. Novak's teachers and appears to be by Detective Curtis. Can you identify that?

A This was -- I can't identify it without the top heading on it. I recall some conversations, bits and pieces of conversation with Detective Curtis. This may

have been prepared after Mr. Novak's interview.
Q Prior to his interview or interrogation on March 9th you were aware in general the information Detective Curtis had received from Mrs. Lawrence, weren't you?
A I really can't answer that one. I don't recall actually all the names that we went through.
Q You want to read it over and look at what information is contained in there and tell me if you're generally aware of that information prior to your interrogation of Mr. Novak on March 9th.
A Yes, sir.
Q You were aware of that?
A Yes, I was.
Q Thank you. Here's a document that appears to be an investigation or an interview conducted on March 8th of Jennifer Whitworth. Can you identify that for me, please?
A Yes, sir.
Q That was information of which you were aware prior to your interrogation of Mr. Novak on March 9th?
A Some of that appears to be an investigation or an interview conducted on March 8th of Jennifer Whitworth.
Q Can you identify that for me, please?
A Yes, sir.
Q That was information of which you were aware prior to your interrogation of Mr. Novak on March 9th?
A Some of the information -- I believe this memo was prepared after Shawn Novak was arrested.
Q But the general subject matter of the interview and what he had gleaned had been reported to you?
A Some of it.
Q This appears to be an interview conducted on March 7th by Special Agent Ewell and Detective Tucker. You had this information before you interrogated him on March 9th?

A That is correct.

Q Let me show you a group of documents. Take a look at the diagrams first. Can you identify that diagram or that sketch?

A Yes, I can.

Q Who drew that?

A John Cleapor.

Q And did the drawing of the sketch correspond with the interview that was conducted and the summary which was attached to it?

A I am going to have to look in the file. There were several interviews conducted with Mr. Cleapor. One interview -- this drawing that you've shown me on top was done by Mr. Cleapor on 3-7-91.

Q March 7th.

A That's correct.

Q Can you tell me what that diagram depicts or what that sketch depicts?

MR. HUMPHREYS: Objection. The witness wasn't the one who interviewed Cleapor. Hearsay. He can have Mr. Cleapor here or the detective who interviewed him.

THE COURT: I think if he knows, he can testify to it.
A I interviewed Mr. Cleapor on this particular occasion. Mr. Cleapor was drawing several knives, a hatchet, and a hammer that John Forton owned.

BY MR. MAHAN:

Q All right. At the very back of that interview the last page thereto another sketch, is there not?

A Uh-huh.

Q What is that sketch?

A That's a diagram of a knife that Mr. Cleapor saw in Shawn Novak's room.

Q You had asked Mr. Cleapor about that in the interview, had you not?

A Yes, I did.

Q You were aware of this information prior to interrogating Mr. Novak on March 9th; isn't that correct?

A Yes, sir.

Q Is that the text that is attached to those diagrams or sketches we talked about? Is that the summary of your interview with Mr. Cleapor?

A Yes, it is.

Q If I may see that for a moment, Detective Hoffman. In this particular interview with Mr. Cleapor this summary of which consists of six pages. This interview of approximately four pages, if you take a look, three and a half pages of it consists of questions and investigation by you regarding Shawn Novak.

A Shawn Novak, John Forton, Mr. Cleapor, and Mr. Roberts' whereabouts. There's numerous individuals. I did not particularly focus on Mr. Novak solely.

Q That wasn't my question, Detective, whether you focused solely on Mr. Novak. About three and a half pages or more of your summary anyway consists of your interrogation of Mr. Cleapor or questioning of Mr. Cleapor regarding Shawn Novak. Is that accurate?

A No, sir, it's not.

Q Well, take a look at it. Tell me what's inaccurate about it.

THE COURT: You're arguing with him at this point. He answered the question twice.

A It consists of an interview with John Cleapor concerning John Cleapor's whereabouts and what he was doing on that day. It also consists of interviews concerning John Forton, his whereabouts, what John Forton did, the type of knives that John Forton was seen with, if John Forton made any threats, what they were. It also consists of Shawn Novak, also about his

knife, what he had said and what he had done

BY MR. MAHAN:

Q Where I marked, Detective Hoffman, on this particular page in the highlighted area in the margin you would agree with me, would you not, that is all information regarding Shawn Novak?

A That is correct.

Q On the next page you would agree with me, would You not, that all Of that information relates to questioning regarding Shawn Novak?

A Yes, I would.

Q And let's look at the next page. Would you agree with me also with regard to that page all Of that regards questioning about Shawn Novak?

A That Is correct.

Q Look at the next page, please.

A All this whole page does not concern all Shawn Novak. There are some things in here about John Forton, his whereabouts and what he was doing.

Q How many sentences relate to John Forton? -

A One on John Forton.

Q Okay. Look at the next page, please. Would you agree with me that that page consists solely of information relating to questioning about Shawn Novak?

A No. This Pertains to actually my interview With Mr. Cleapor. It contains what mr. Cleapor's involvement was in the search.

Q It also deals with Shawn Novak, does it not?

A Yes. It has his name as long as other names in it.

Q It inquires about the activities and whereabouts of Shawn Novak?

A That is correct.

Q That's all I have about that document. Now having seen all these documents with which you're familiar before you interviewed Mr. Novak on March 9th, can you tell me, Detective Hoffman, why is it that

you weren't even the least little bit suspicious of Shawn Novak on March 9th?

A I didn't say I wasn't suspicious.

Q You were suspicious about Mr. Novak on March 9th; isn't that right?

A I was suspicious of everyone at that point.

Q You just told us earlier that he wasn't a suspect?

A He was not a suspect.

Q Is there something different in your mind between being suspicious and being a suspect?

A Certainly.

Q Did you ever communicate to Shawn Novak or Mrs. Novak that you were suspicious about Shawn Novak?

A No.

Q Never once?

A Never.

Q In fact, you lied to Mrs. Novak on more than one occasion and told her that he wasn't a suspect, didn't you?

MR. HUMPHREYS: Asked and answered several times during the examination by Mr. Brydges.

THE COURT: You can answer it.

A I never told Mrs. Novak that he was a suspect.

BY MR. MAHAN:

Q You told her, in fact, that he was not a suspect?

A That is correct.

Q That was a lie?

A No. That was not a lie.

Q I'm sorry. He was not a suspect, but you were

just suspicious about him?

A Certainly.

Q Now, you had the benefit of all this Information before you interrogated Mr. Novak on March 9th, right?

A That is correct.

Q And these ruses you told us about that you were going to use on Mr. Novak are ruses that you had planned prior to him coming in on March 9th; isn't that right?

A No, that's not true.

Q Well, you had developed some of these tricks. You told us that you were planning to ask some of them.

A That was developed later in the interview while I was talking with Shawn.

Q Wait a minute. You told us you knew you were going to use some ruses.

A Yes, I did. That was developed during the interview. That was not planned beforehand.

Q Before you went into that interview, you had absolutely no intention of engaging in any ruses with Mr. Novak?

A No, sir.

Q At what point in the interview, Detective Hoffman, did you decide that you were going to start engaging in ruses?

A After we discussed Tuesday. Then we took a Break. I decided at that point I would go ahead and try a ruse and see what type of response I could elicit from Mr. Novak.

Q At that point where was Mrs. Novak?

A I believe she was outside in the lobby.

Q And you told Shawn that you wanted to take a break to go say hi to his mom so she wouldn't be nervous.

Isn't that what you told him?

A Sure.

MR. MAHAN: That's all I have, Judge. Judge, I would ask to introduce these documents.

MR. HUMPHREYS: I would object to all except the interview with the witness that he has testified he conducted. It would be clearly hearsay as to the other individuals, and counsel could have called those as witnesses.

THE COURT: For the purpose of him having seen then and acknowledge them, I'll allow them to come in.

MR. MAHAN: I'll be glad to clarify for the record my only purpose in offering them is not for the truth necessarily what's contained therein. The truth simply for what information or knowledge Detective Hoffman had prior to conducting the interview of March 9th.

THE COURT: Right.

MR. MAHAN: Thank you.

THE COURT: Staple these together. Are they in any kind of order?

MR. MAHAN: No, sir.

THE COURT: I'll go ahead and staple them together and mark them Defendant's Exhibit 1.

(Marked in evidence by the court as Defendant's Exhibit Number 1.)

THE COURT: Questions?

MR. HUMPHREYS: Just a couple.

BY MR. HUMPHREYS:

Q Detective Hoffman, can you give us in round numbers an approximate number of people during the course of the investigation at one time or another you had some suspicions about?

A Probably about eight.

Q In police parlance, the language that police officers speak to each other, what does the word suspect mean to you?

A Suspect means we've really focused in on someone that we believe that they were either solely or worked in connection with someone involved in the crime.

Q Is it your testimony that you didn't feel that way about Shawn Novak until he gave the answers he gave to these ruses that you placed to him?

A That is correct.

MR. HUMPHREYS: Thank you.

MR. MAHAN: Nothing else.

THE COURT: Thank you very much.

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THE COURT:- Does the defendant have any other witnesses they would like to call?

MR. BRYDGES: No, sir, Your Honor. We would ask the court to either look at the tape or read the transcript because I think there's so much we've skimmed over that are certainly manifested in those written words.

THE COURT: Okay. How about the Commonwealth? Have any other evidence?

MR. HUMPHREYS: Just argument, no witnesses.

THE COURT: You've handed me the tapes, but I've sort of got the impression that you are satisfied that it was only necessary for me to read the transcript. Do you want me to review the tapes as well?

MR. BRYDGES: I think it's pretty much contained unless you want to see the demeanor or the total atmosphere under which these interviews were conducted, Your Honor. It might not be necessary to look at all of them. It probably would be helpful just to see the environment that Your Honor's probably already familiar with.

THE COURT: Again, I don't mind doing it. I think we have a VCR and television in the jury room. I don't mind. Any objection to my just doing that in camera basically with these documents and reading the

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(THE COURT:) ...have any additional evidence that they would like to present in the motion to suppress?

MR. BRYDGES: I can't think of anything, Your Honor.

MR. HUMPHREYS: We have nothing else, Your Honor.

THE COURT: Since it's already one o'clock, why don't we recess until two. I'll give you an opportunity to argue your motion at that time.

MR. BRYDGES: All right, Your Honor.

THE COURT: We'll be in recess then until two o'clock.

(The hearing recessed at 1:00 p.m. At 2:05 p.m. the hearing continued as follows:)

THE COURT: Mr. Brydges, would you or Mr. Mahan like to make an argument?

MR. BRYDGES: I think probably the burden is on the Commonwealth at this stage.

MR. HUMPHREYS: I think it's your motion.

THE COURT: It is your motion.

MR. BRYDGES: All right, Your Honor. We'll be happy to proceed. May it please the court, first of all, let me say, Your Honor, that there's nobody in the courtroom or probably outside of it that has any higher regard for the law enforcement people than I do. That includes Mr. Hoffman, Detective Hoffman. I can say unequivocally that I can sleep much warmer, more securely each night knowing that the Detective Hoffmans and people like him are out there. They have a tremendously difficult job, and I appreciate that. This particular case cried out I think from its inception for a result to the horrible tragedies that occurred on March 5th. Of course, each time you look at the news you'd see Mr. Humphreys or somebody from his office indicating to the public that there was an intensive campaign to bring the perpetrator of these crimes to justice. My concern, of course, Your Honor, comes from that rush to judgment situation that we have here. Even though there was an intense desire to find the perpetrator, I think you must stay within the confines of the constitution and within the parameters of decency in so doing. I think in this instance, both of those situations were violated.

Mr. Novak, there can be no question, was a suspect from the beginning. When the calls came from his teacher and the calls came from other people and they were at the home on two occasions and then had him at the interrogation room at the Princess Anne Courthouse or Princess Anne Public Safety Building, it was perfectly clear despite the protestations of Mr. Hoffman to the contrary that he was a suspect. Now, Your Honor, the question of ruses -- he uses the word ruses. They are just blatant lies is what they are. If you want to take the position as I'm sure the Commonwealth will, Your Honor, then that's perfectly all right in the pursuit of the truth and the pursuit of confessions even for juveniles.

I call Your Honor's attention to the fact that this boy was just forty days away from being fifteen years of age. He had just turned sixteen on the 20th of January. This offense -- these interviews took place on the 7th, 8th, and 9th of March, just forty some days later. He was a seasoned sixteen-year-old as I'm sure the Commonwealth will tell you when he was taken to headquarters and asked to be brought to headquarters by his mother. There can be no question, Your Honor, that she said -- because you saw it and you read it -- I am skeptical about this. This boy's father is not available. He's in the service, and he's in Connecticut or wherever he is. I am all this man has got. I don't like secrets. I want to be there, and I want everything recorded. I submit to the court, Your Honor, that she was his counsel. Forget whether or not someone's licensed to practice law and has a license on his wall. Mrs. Novak made it very clear that she was this young man's counsel. She was going to advise him, as she told the court when I examined her, as soon as something got sticky. I was going to say, time out, Shawn, that's it. We're going to get somebody here.

There was no question in Detective Hoffman's mind that was the case. He put up with her being there for a while because he had to go through those motions. He knew that she was there to intervene at any time if the situation got out of hand as far as she was concerned. Knowing that he was not going to get anywhere with the small talk, he asked that she leave the room. It's one thing to lie to a defendant who is being subjected to interrogation, but it's still another thing yet to lie to a parent who is there in loco parentis and in this instance, counsel for her son, who in her judgment was unable to handle himself in a one-on-one situation like she saw and envisioned was going to take place.

Now the very thing that the Fifth Amendment purports to protect is the rights of this young man to remain silent and not to make any statement contrary to his interest or any statement that would be subject to making an exculpatory statement. They told her, If you leave the room and give us the opportunity to talk to your son, we're not going to talk to him about anything accusatory involving these two deaths of these two youngsters. We're not going to do that. We're going to talk to him only about his friends. He might be reluctant to talk about those people while you're here. She made it very clear, Your Honor -- and I don't think there's any question -- I'm leaving on the basis that you're telling me the truth here. I'll go outside, and you're not going to question him as a suspect or someone that you're trying to get to make a statement against his constitutional rights or interests. That was the only reason that she agreed to sit in the lobby, Your Honor.

Now, she went out there. Your Honor heard the rest of the story. Detective Hoffman said in about forty minutes after she left -- I may be wrong, about thirty to

forty-five minutes -- this man became a suspect. I submit, Your Honor, that he became a suspect long before that if you read the exhibit that Mr. Mahan tendered to you showing the statement of the teachers and the claim for all the other people that said, I was there. I was the one that saw the bodies and so forth. They knew exactly what they were going to do when they got him in there. Now, all of the machinations of, We're only going to ask him about this that and the other, and he's not a suspect is fine except it was not true. It was not any more true, Your Honor, than the statement they made to him about the fingerprints on the jacket and the eyewitness that saw him with these two young men. I think it's interesting that threaded through this entire examination, Your Honor, is the fact that he was rather resolute in saying, No, I didn't walk in the woods with them. I didn't do this. I didn't do that. I'm confident of that.

He never got to say too much, if you will recall. What we just heard for the last hour and half or two hours. Mr. Hoffman was doing all the talking. You could see his hands every now and again in the picture as the camera projects coming in towards his face. You could never see Detective Hoffman. You could hear him saying, I'm not trying to trick you now. You're not a suspect. I'm not trying to do this. You know I'm your friend. I'm here to help you. There was nothing in the course of that entire interview after he asked Mrs. Novak to leave, Your Honor, that had anything to do with any of the other people that he had said he was going to ask him about. Nothing about Cleapor, nothing about Young or any of the other people. It was all zeroed in one hundred percent on getting him to make a statement. When it didn't come fast enough, the lies or ruses if you will begin to come to the fore.

He was told one lie after the other. The case law, which I will give Your Honor in a moment -- of course, the thread through all of it is the totality of circumstances. Most of the cases that deal with totality of circumstances are adults. We've got to remember here we're only dealing with someone who is barely sixteen years of age for whose rights there is a higher degree of burden than someone who is a mature adult. Now, I've heard certain suggestions by the Commonwealth that this boy is an intelligent young man. I ask the court to look as he sat in the interview and see just how pliable he was to suggestions of Detective Hoffman. Everything that Detective Hoffman said to Shawn Novak in the way -- could it have been this way, son? Could it have been that you touched them? Could it have been that you found them? Yeah, yeah. Eventually after saying, No, that's, not true. You might as well tell me because we've got the person that saw you there. We've got your fingerprints on this. Everything that he wanted him to say, Shawn Novak said. I submit to the court that Your Honor or Mr. Humphreys or Mr. Zanin or Mr. Mahan or myself could have done the same thing given the circumstances under which he was interviewed.

I think the circumstances under which he was interviewed are extremely important. You can say all you want that he is not in confinement, that he is not under arrest, that he is free to come and go as he pleases. If that's the case, why not conduct that interview in the lobby with his mother? Why not conduct it in the house where the boy lived and they were there a couple times? Why do we have to have him in that six-by-eight room or whatever it is with the padded walls and camera in the ceiling, with Officer Vanderheiden or Officer Price being out there looking in the window at the same time with Detective Hoffman

very conveniently located at the door in between this young man and any way out of the place? That's not to say that Mr. Novak was thinking about bolting out or running out. He was not. It's just the way that it appeared to him.

The case law that I will give to Your Honor shortly makes that statement very clear. It's how it appeared to this young man. What he was free to do and not free to do? He was, for example, Your Honor, free to get and eat a hamburger and smoke cigarettes, which I think is singularly interesting for a sixteen-year-old to be given cigarettes by the detective knowing that's against the law. He did that to relax him so that he could get from him that which he wanted.

Now, Your Honor, let me say to you -- and I'm just as sincere about this as I am about anything because I think what we've seen is deplorable, unbelievably deplorable. The very purpose -- and I asked Detective Hoffman this -- his asking this boy's mother to leave was to circumvent this boy's Fifth Amendment rights. He's saying he asked her to leave so it would be easier for him to get the truth out of this young man when the reason Mrs. Novak was there -- she made it perfectly clear that the reason she was there was because she wanted to protect those very rights that he put her out of the room to expose. He succeeded at it. How did he succeed at it? Because he lied to her. Feel free to step out there in the lobby, Mrs. Novak, because I'm not going to zero in on the deaths of these two boys. It's an extraneous matter altogether. If I need you, I'll call you. If he gets in any trouble, I'll let you know. Well, of course, she was not consulted as Your Honor watched this boy taken down the primrose path. If anybody was taken down it, he was.

Let me say this to you. Now, you're not telling me the whole truth. I'm here to help you. I'm not going to trick you. I'm your friend. Let's talk about these laser fingerprints on this jacket. I didn't touch these boys. Yes, you must have. How are we going to explain that, Shawn? We have got to explain that, Shawn, because if you don't, we've got a problem. If Your Honor please, if that's not accusatory, I don't know what is. There's nothing at all in that transcript from the time Mrs. Novak left that room that is anything in the world but accusatory. He was the subject of an interrogation getting him to confess, and it was easier for him to confess if this officer not only lied to him in order to get him to make these statements but lied to his mother to make it easier to lie to him. It would be a different matter, Your Honor, all together if she had come in -- Mrs. Novak -- and said ab initio, I'll wait out here. You go ahead and talk to Shawn. He's comfortable. She made it very clear I think on her direct examination. She said, He's my responsibility. He has no one but me. Maybe I've seen too many movies, but I think I ought to be with him. Well now, Mrs. Novak, we can get so much more out of him if you just go out there and sit and be a nice lady. Go on with your life. Run some errands. Do some chores. I'll bring him home. He'll be perfectly all right with me.

He never intended to bring him home. He knew that given the opportunity to be with this pliable, barely sixteen-year-old young man he could get him to say whatever he wanted him to say if he didn't have somebody there representing him. His mother was there to represent him just as clearly, Your Honor, as if I had been there or Mr. Mahan had been there. She was his counsel. She made no bones about that to that officer. Now then, as time went on through this interview and he began asking the very pointed

questions, Now, come on, Shawn, let's get to the truth of it. You're going to feel better. This young man dropped his head for what I timed to be a good five minutes. That's what Mr. Hoffman estimated. Certainly, Your Honor, and clearly at that time it was accusatory. Can there be any mistake about that? Clearly at that time, Shawn Novak was a suspect. There couldn't be any mistake about that. Did he go out into the lobby where he knew this man's counsel and mother was sitting and say, Look, I think you better come back here now because things are getting sensitive? He did not. When he got him to make the admission that he made, he was going on with the interview, going on with him until a knock came on the door saying time out. You've got to advise him of his rights. Did you see the condition of that young man, Your Honors when that form was shoved over to him, weeping and in tears and his head in his hands for the previous five minutes and was given a pen and said, Check right there, Shawn? Check right there.

They went on and questioned him even after they went out and told his mother that he's confessed. They didn't stop it there. Still another officer had to come in and say, Wait a minute guys. Let's back off here a little bit. They had everything that they wanted contrary to his mother's wishes. No one was there to counsel him. Not because they hadn't called her. Most of the cases that I'm going to cite to Your Honor are questions of no parent was called. No sister or brother was called, no one in loco parentis was called. No friend was called. No counsel was called. In this instance, counsel was there and was there from every occasion that he was asked to be spoken to. In each and every occasion she says, I'm his sponsor and his mother. I demand to be there and have what you're saying to my son recorded. If it's not recorded, then I'm not going to participate in

waiting in the lobby. It was only when they lied to her that they got her out of that room.

Now, somebody's going to be reviewing this no matter what happens I'm sure, Your Honor. As I read the case law and Your Honor's familiar I'm sure from his days on the juvenile court with in re Gault, an Arizona case as I recall that was decided in 1966. A fifteen-year-old boy was taken into custody. That initial language in Gault -- Your Honor let me give you the cite of that. I'm sure you have a copy on your desk -- 387 U.S. 85. The language that was taken from that case and is threaded throughout all of the other cases that I will cite to the court -- I think it's 1447 and 1448 -- He has a right to counsel. An infant has a right to counsel. An infant has a right to counsel noted in the decision in Arizona state, the public welfare bar 18 Az. 249. It referred to a provision of the juvenile code where it is characterized in Arizona, requiring that the probation officer look after the interest of neglected, delinquent, dependent children, including representing their interests at interviews.

The court argued that the parent and the probation officer may be relied upon to protect the infant's interests according to the proposition that due process requires that an infant have a right to a lawyer or counsel. It said that the juvenile courts have the discretion but not the duty to allow such representation. It refers specifically to a situation from which the juvenile court discerns conflict between the child and his parents as an instance in which the discretion might be exercised. We do not agree. The child requires the guiding hand of counsel at every step in the proceedings against him. we indicated our agreement with the United States District Court of Appeals District of Columbia Circuit that the assistance of counsel is essential for purposes of waiver proceedings. So we

hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration.

They say in that case and all of its progeny, Your Honor, that it is essential that this young man have some advice of counsel. All of these cases I call to Your Honor's attention. In each and all of these cases the defendants were advised of their rights. That was the first thing that they did. You have the right to remain silent. The thread of what we're seeing here is whether or not the youngster because of his tender years understood those rights without the advice of counsel. This man here, Your Honor, was never advised of his rights. Despite the fact that the interrogation had become accusatory and that he was a suspect, he was never advised of his rights until they got that statement, Yes, I did it. Then and only then is when the knock came at the door. Enough is enough. Let's get him to sign the statement. Then they advised him of his Miranda rights, after the confession was in their pockets. That's not the case in any of these cases I'm going to cite to the court. In every one of them, they had two or three people or individuals advise them of their rights, right to remain silent.

The questions in these cases is, can they comprehend them? We have an entirely different situation here. The situation is different according to the Commonwealth because they're trying to convince this court that this was not an accusatory investigatory suspect. Now, if Your Honor accepts that position that they had this young man here running down other leads, and all of a sudden without any prodding or any ruses if you will, he bursts out a confession, then, of course, our position is dead. I don't believe that the court in seeing the same evidence and reading the same evidence that I

saw and read, can possibly come to that conclusion. Where in the entire preamble to all of the interviews that he had with Shawn Novak, Mr. Hoffman had while Mrs. Novak was sitting in the lobby, do you see any reference to him saying to Mr. Novak, Now, I promised your mom, Shawn, that I was going to talk to you only about Mr. Cleapor and Mr. Young and some of the other youngsters. We're not going to talk about the two deaths. We're going to talk about the other. If we start talking about the other, then I'll call your mother in. There was never anything to that effect. He went right on full bore going down the path to a confession. He never stopped until he got it. He got it only because this boy was denied his right to counsel. When I say counsel, I'm not talking about me or Mr. Mahan or any other lawyer in the City of Virginia Beach. I'm talking about Mrs. Novak. She was his conscience. She was his mentor. She was his parent. She was his lawyer. She was in !the building. You could reach out and touch her. She was not allowed to give the advice and counsel that any mother would want to give her child. This particular mother told Detective Hoffman that she wanted to give it and was there to give it and would not leave until she could give it.

Next thing she knew, We've got bad news for you, Mrs. Novak, bad news for you. Your son has confessed. Well, let me see him. No, he went back in and questioned him some more, even though he had the right to have counsel. When she told them -- she told this court, if Your Honor will recall yesterday -- what would you have done if you had been called in there? I would have told him not to say any more until he had a lawyer. She said when they came out and told her he confessed, I want to see him. I want a lawyer for him. Did he get that at that time? He did not. That, Your Honor, is indicative of the entire way this investigation,

if you could call it that, was conducted.

Let me call Your Honor's attention also to the case in Virginia, Grogg against Commonwealth. It was decided in 1988. I'm sure the Commonwealth will cite it because it upholds the confession. That's at 6 Va. App. 598. Your Honor, let me read from that case. That case as I recall was a young lad that was picked up in Florida of fifteen years of age. He was a runaway or delinquent. He was locked up there to be returned to Fairfax. I think that was the situation here. He was advised of his rights while he was down there both by the judge, and he was advised by the public defender they sent in to see him. They went into a little soliloquy with him. It's in here. Do you understand -- and let me read this to you. Do you understand -- they went through it one point at a time. They ultimately held that he was properly advised and that even though he had nobody there with him, that the confession was good. They gave him the right to call his sister. He didn't choose to call his sister. He had all kinds of rights they went through. The Commonwealth's Attorney was there or some attorney was there and went through a whole litany of things about the rights form.

Now, the court said in that case, Your Honor, a heavy burden rests upon the Commonwealth to demonstrate the accused made a valid waiver. The totality of circumstances the court permits, indeed mandates, inquiry until all circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience -- in many of these cases the youngster has been in trouble before, not so in this case -- educational background and intelligence, and into whether he has the capacity to understand the warnings given to him. In this case, he didn't get any. He didn't get any in this case, understand them or not, the nature

the Fifth Amendment rights, the consequences of waiving those rights.

The Supreme Court said in Grogg, The greatest care must be taken so that admission was voluntary and says that not only was it not coerced or suggested -- now think about that in context with Shawn Novak's case. That it was coerced or suggested but also that it was not the product of ignorance or flights of adolescent fantasy or despair. Now, these statements in Grogg, Your Honor, are given because the Supreme Court of Appeals, I submit to the court, wants to let this court and any other courts in the Commonwealth know how it addresses this particular problem. It goes on to say on Page 613, We had here to the view that it is desirable to have a parent, counsel, or some other interested adult or guardian present when the police interrogate a juvenile. It is, of course, more desirable to have an adult present, interested adult present, when a juvenile waives fundamental constitutional rights and confesses to a serious crime.

He never waived anything because he was never given anything, even when it was clearly accusatory and he was clearly a suspect. You will recall Detective Hoffman's statement to Clark Daugherty, Your Honor, in the juvenile hearing. At what point did it become accusatory? Well, when he began to give me contradicting statements. That was throughout, Your Honor. This young man was a suspect in the investigation, and it was accusatory from the moment that Jenny Novak was ushered into the lobby. There can be no question about that. We hold that in the case of a juvenile, presence or absence of parent or guardian or interested adult or counsel is a circumstance and fact to be considered in the totality of the circumstances when determining whether or not the waiver is

intelligent. The absence of a parent or counsel a circumstance that weighs against the admissability of the confession. It's Miller against Maryland.

At the time -- Grogg goes on to say on Page 614, Your Honor -- of the confession, he was a week shy of his sixteenth birthday. We don't have much difference here. Gault had completed the seventh grade. He was in good physical health at the time of the confession. He was not on any drugs or alcohol. He had a fairly good intelligence level. By the same token, Your Honor, they tell the court that the burden is a heavy burden upon the Commonwealth. That's after this boy was advised of his rights. In this case, we have no such advice.

Your Honor, let me read to you some of the things they told the young man before they extracted this confession. Commonwealth's Attorney -- Mr. Grogg, you went to see the investigator. He told you once again that you have a right to remain silent? Yes, sir, he did. He told you that you didn't have to talk to him if you didn't want to? Yes, he did. Commonwealth's told you that anything you, said could be used against you? He said, Yes. You have a right to a lawyer? Yes. It goes on and on. We don't have any of that here, Your Honor, nothing whatsoever.

I'd like to call Your Honor's attention also to case of Gallegos against Colorado. That's to be found, You Honor, at 370 U.S. 52. In that case, it says five days went by without the parents being contacted or seeing that he had a lawyer. In this instance, I call your attention to Page 1212 where the court says, There's no evidence of prolonged questioning during the five-day detention during which time, the boy's mother unsuccessfully tried to reach him. He was cut off from contact from any lawyer or adult to advise him. It gave

the case an ominous cast. The prosecution says that the boy was advised of his right to counsel. They did not ask for a lawyer or for his parent. A fourteen year old - and once again we don't have that here, Your Honor. I think that's important that you keep in mind, as I know you have A fourteen-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he's made accessible only to the police. That is to say, we're dealing with a person who is not equal to police in knowledge and understanding of the consequences of questions and answers being regarded. He was unable to protect his own interests or know how to get the benefit of his constitutional rights. The prosecution says the youth and immaturity and the five-day detention are irrelevant because the basic ingredients of the confession came tumbling out as soon as he was arrested. Well, we don't have that here either, Your Honor. Nothing came tumbling out except denials, denial after denial and, I feel comfortable with you because you're not going to trick me. I wasn't there. I didn't do this deed, until he was told he must have because of his fingerprints and people saw him there. The pliability of this young man and his fear of authority and his willingness to adhere to any authoritative figure caused this confession to come forward.

This young man would have no way of knowing what the consequences of his confession were without the advice of his rights from someone concerned with securing him those rights. Without the aid of more mature judgment as to the steps he should take in a predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner that protection. There's no guide in the decision of cases such as this except totality of circumstances -- the youth of the petitioner, the long detention, failure to

send for his parents. They never sent for his parents. The parent was there. The failure to immediately bring him before the judge or the juvenile court, the failure to see to it that he had the advice of lawyer or friend. All of those combined to make us conclude the formal confession in which this confession was made and was obtained was in violation of his due process. That's Gallegos. They cite in there Haley against Ohio. Let me give you Haley against Ohio.

Haley against Ohio is in -- let me see if I got the cite here, Your Honor -- 332 U.S. 596. I don't have any alternate cites, Your Honor. A fifteen-year-old boy after five hours of interrogation. The court says this young man needs counsel and support. This is so as not to become first the victim of fear and then the victim of panic. He needs someone on whom to lean lest the overpowering presence of the law as he knows it may not crush him. No friends stood at the side of this fifteen-year-old as the police worked in relays. We don't have relays here. We've got people peering in the window and advising Mr. Hoffman when it was time to do this and when it was time to do that, to give him a drink of water or a doughnut. That's what we've got. They didn't have to be in there hammering. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. I didn't have to call anybody here. She was there.

They disregarded the standards of decency as underlined by the fact that he was kept incommunicado for over three days during which the lawyer retained to represent him twice tried to see him and twice was refused admission. We don't have that extreme

situation here. We do have the situation where someone was there that could give him the advice and comfort and counsel that he needed who was within a stone's throw or less of his person and who even more dastardly, Your Honor, was told to go there and be secure because we won't zero in on something that is going to perhaps influence the rights of this young man. We will certainly solicit you immediately and let you talk to him -- all lies, all lies.

There can be no other word, no kinder word, no gentler word than the fact that the mother was lied to, that the youngster was lied to. The Fifth Amendment was kicked right in the teeth. They got what they wanted. In the Haley case, we are told that the boy was advised of his constitutional rights before he signed the confession. Knowing them, he nevertheless confessed. That assumes that a boy of fifteen without the aid of counsel would have a full appreciation of advice and the fact that he had freedom of choice. Moreover, we cannot give any weight which merely formalize constitutional rights, formalize respect for constitutional safeguards, cannot prevail over the facts of life which contradict them. They may not become a cloak for investigatorial practices that make even empty form of the due process of law clause for which free men fought and died. Those cases were all reversed.
There's another case, Your Honor, that I think is interesting. I'll mention it to you because I think it's important in the context of his environment as he was questioned. Now, Your Honor's familiar with the interrogation rooms I'm sure. You saw a little bit of it in the video that we just looked at. I'd like to call the court's attention to the case of Gary Wayne Wass against the Commonwealth. That's 5 Va. App. 27. On Page 32 of that opinion is a young man that had a raid on his house for drugs as I recall. They surrounded the

place with dogs -- he had the dogs. Wass had the dogs. The police surrounded it with guns drawn and shotguns drawn and told him they would like for him to stick around there, that he wasn't under arrest or in custody. They would like to have the owner present when they searched the premises. He was free to leave while the police encircled the place with shotguns.

On Page 32 the court says, Although the defendants in Miranda and companion case were requested at police headquarters, the Supreme Court soon made it clear that an accused could be in custody unless entitled to the Miranda safeguards and at a location other than police headquarters. All of these damaging inquiries of Shawn Novak were done at Police headquarters. The court asked the question of Detective Hoffman, Why did you have to do it there? Well 's more convenient for you. Of course it's more convenient. Questioning in a coercive environment alone is insufficient to trigger the need of a Miranda warning. Although the accused was questioned in the coercive environment of a Police station, he came there voluntarily and at the close Of the interview did, in fact, leave the station without hinderance. This was an adult, Your Honor.

The court refused to require police officers to advise Miranda rights to everyone whom they questioned. There must be first a restriction on the person's freedom. It is only when a suspect's freedom of movement is curtailed to a degree associated with the form of arrest, the suspect is entitled to full protection of Miranda. In making that determination, the situation must be viewed from the vantage point of how a reasonable man in the suspect's position would have understood his situation. We've got a boy barely sixteen, Your Honor, in that interrogation room with the walls padded, not big enough to swing a cat in, there

without his mother, with a policeman sitting at the door within a foot or two of his face.

To determine whether a restraint is custodial for Miranda purposes, a host of factors must be considered. Among the factors that must be considered are whether the suspect is questioned in familiar or neutral surroundings, the number of police officers present, the degree of physical restraint, the duration of the interview, when probable cause to arrest exists, and when the suspect becomes the focus of the investigation. Those are relevant facts to be considered. The language used by the officer to summon the individual, the extent to which he or she is confronted with evidence of guilt -- just as Mr. Hoffman did with fingerprints, someone saw you there. The duration of detention, the degree of pressure applied to detain the individual may be significant facts. The fact that an investigation has been an excuse to focus upon the suspect is not necessarily determinative of custody. However, in probable cause for arrest, standing alone does not trigger the right to receive Miranda. The list of relevant circumstances is not exhausted. The circumstances of each case must be considered from the viewpoint of a reasonable person in the suspects situation.

They told Wass in this case he was not under arrest and was free to leave. They also told him that they would like the resident to be present when they conducted a search. Though informing a suspect that he is not under arrest is one factor frequently considered to show lack of custody, it is not a talismanic factor. The fact that they told him that he was not under arrest is not significant. I think when you consider he was never advised of his rights at any time until after his confession. He was not in custody did not necessarily mean that he was in custody. Similarly, we hold that

informing a suspect that he is not in custody and is free to leave does not necessarily mean that he is not in custody. Other circumstances may dictate a finding that custody actual exists.

Now, Your Honor, there's a number of cases here. I'll be happy to supply the court with the cites. They're all different from Shawn Novak because in each and every one of these cases, if I'm not mistaken, the people were initially -- juvenile or otherwise -- advised of their constitutional rights. The question then became whether the waiver was intelligently given and whether he understood these rights. We do not have that here. We do not have any advice that he was going to be questioned, that he had a right to remain silent, that he had a right to have his mother in the room. We don't have any of that.

Now, Your Honor, there's nothing as tragic in my experience in Virginia Beach than the deaths of these two youngsters. I guess the only thing more tragic would be to rush to judgment of a trial and conviction from someone who has not had safeguarded all of his constitutional rights. I think we have made it abundantly clear here that this young man was lead right down the path. If this case goes on to trial and God forbid that this young man is sentenced to death, I'm just wondering, given what we heard from Detective Hoffman, given what we saw on that screen, given the fact that the youngster's mother is in the waiting room and wanting to see him and advise him and protect him, how we're going to feel when the lights at Mecklenburg dim. I don't know that I can live with it, Your Honor, not having heard what I've heard and saw what I saw. I would ask the court to suppress this evidence.

MR. ZANIN: Thank you, Your Honor. From listening

to Mr. Brydges, it appears to me that his primary concern or his primary issue that he perceives to exist with regard to the facts that have been presented to the court is whether or not that period of time wherein the interview was conducted by Detective Hoffman of the defendant prior to his being advised of his Miranda rights and if it was or was not a custodial interrogation. I perceive from what Mr. Brydges has said as it relates specifically to that portion of the interview, that is the prong that he's proceeding on with regard to what we have before the court. I will address that. I will go into those matters which he's addressed. Perhaps, I think I will go a little farther.

I think first we have to look at the historical basis with regard to what is a custodial and what is not a custodial interrogation and why, in fact, it exists. I think a the good place to start is Miranda v. Arizona, which I'm sure the court is certainly familiar with as we always hear it being cited. I think in essence the Supreme Court determined that police officers must inform a defendant of his constitutional rights before a custodial interrogation begins. Furthermore, I think the court was specific in indicating that such an interrogation is defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. I would submit to the court that circumstances which deprive a person of his freedom to leave or freedom of action render him in custody for purposes of Arizona.

Mr. Brydges has cited both the Grogg and the Wass cases in the Commonwealth of Virginia. I would look to the court as reviewing those, and I'm sure Your Honor has. Within those parameters of those cases, the concept of totality of circumstances at least in this

Commonwealth is addressed with respect to custody. I think in Wass v. Commonwealth we'll find that the ultimate inquiry -- at least the court says that the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with formal arrest. Wass cited California v. Beheler, where that proposition essentially came from a 1983 Supreme Court case. Furthermore, custody does not result merely because an individual is questioned in a coercive environment or is the focus of a criminal investigation. Davis v. Allsbrooks, 778 F.2d 168 on Page 171, a 1985 Fourth Circuit case. Neither, Your Honor, does evidence that questioning was accusatory determine the question of custody. That determination of the court can be found in Smith V. Commonwealth, 219 Va. 455 On Page 470, a 1978 case. Moreover, Miranda -- the rule does not imply an incriminating statement is made before custody but after an investigation has become accusatory. Now, Mr. Brydges suggests to the court the fact that he may have been a suspect and the questioning was accusatory rises to the level of custodial investigation, i.e., he was deprived of his freedom in some significant way which rises to the level of him being in custody or under formal arrest.

I would submit to the court that in review of the evidence, not only from the perspective of what you read in the transcript and what you've heard from the witness stand and also from reviewing the tape revealing that, number one, Shawn Novak was talked to on more than one occasion prior to the morning of March 9th when he and his mother came to the police department. He had talked to police before. He knew what they were talking to him about. Permission had been granted by his parent to talk to the police. He was never placed in custody. He was never placed under formal

arrest. He was asked to come back to the police department on the morning of the 9th of March. His mother voluntarily brought him to the police department.

My recollection of her testimony is she testified that she knew that both she and her son could leave if they wanted to. Furthermore, she knew that she didn't have to let him talk to the detectives. Yet, as the transcript reveals and as the video has shown, she voluntarily determined that she was going to leave that interview room and let Detective Hoffman continue with the interview of Shawn Novak.

Mr. Brydges suggests that there were promises made to the mother. I would ask the court to review the transcript. The only promises I ever recall Detective Hoffman making to the mother was a promise to take Shawn home if he wanted to leave.

You will also recall that throughout the course of the interview that he was free to have breaks. He was provided with amenities. In fact, as I recall the testimony, I believed it indicated that he even went out into the lobby to see his mother during one of the interviews. At which time, she could have gotten up and said, Let's leave, son. There's no necessity for you staying here any longer. He could have said, I want you, mother, back in the interview room. There was no affirmative action on his part throughout the course of the interview ever to indicate that he wanted his mother in the interview room.

Now, the assessment of the interrogation setting from the vantage point -- and I will agree with Mr. Brydges -- of how a reasonable man in the suspect's position would have understood the situation. That proposition, Your

Honor, comes from Berkemeyer v. McCarty, a United States Supreme Court case decided in 1984. As in the case of an adult, reasonableness with respect to a juvenile is determined through an examination of the totality of the circumstances. This test as I've indicated before emanates from Grogg.

Shawn Novak never indicated any misunderstanding throughout the course of his interview that morning before or after he was advised of his Miranda rights. You will recall on the videotape and also as shown in the transcript itself when his mother left, he affirmatively said, I don't have any problem. Therein, after she left he kicked back the chair against the wall, lit up a cigarette, and proceeded on with interview with Detective Hoffman.

Your Honor, the police officer in this case interviewed Shawn Novak at least four times that we know of. The interviews took place with the consent of Mrs. Novak and were conducted both at home and at the Virginia Beach Police Department. He was not arrested nor detained until the fourth interview when, in fact, his freedom was restricted.

I would submit to the court that the detectives who interviewed Novak showed a commendable amount of restraint and sensitivity towards his age. The scenario and the behaviors were far removed from the incommunicado interrogation in a police dominated atmosphere, which Miranda properly deplored.

Similar to Miranda, although not as deplorable as the case cited by Mr. Brydges, the Wass case, wherein the Commonwealth also cited the proposition with regard to the totality of the circumstances and what the court must look toward. Here we did not have a young man

whose house was surrounded by police with drawn guns who was taken off to the police department. We had an individual who came to the police department with his mother at the request of the police.

Your Honor, at the beginning of the interview on the 9th of March, 1991, Detective Hoffman explained to Mrs. Novak and to the defendant that he was not under arrest. We know that. That's part of the transcript. It's part of the videotape. It's part of the mother's testimony. This understanding and willingness to talk was acknowledged by both the mother and the defendant. They similarly agree that Shawn could speak to the detective alone. Shawn Novak, Your Honor, is a sixteen-year-old intelligent individual. You heard the testimony from his mother. An honor's English student, a national percentile rating in the 95 to 99 percentile with regard to language skills and such things as that. There is no evidence presented before the court that we have an individual who is suffering or under the influence of drugs or suffering from some mental disease or defect. There is no evidence before the court that, in fact, he did not know what he was doing. The only evidence that the defense has presented before the court is the testimony of the mother and the transcript which has been presented to the court and the videotape. All of those in and of itself give the court to look at the totality of the circumstances.

Once Novak admitted to killing the boys, the police properly stopped the interrogation. At that point he was advised of his Miranda rights. He voluntarily and knowingly waived those rights. There is no evidence before the court that was not a knowing and voluntary waiver on his part. Subsequently, he was further interrogated at that point. Only because Mrs. Novak was advised of what he had said -- which I would submit

to the court that no one had the duty to inform her of because no promises were ever made to her with regard to a statement such as, If your son says something to us which we consider accusatory and/or putting him in a position wherein he is culpable for the offense, we will go out and tell you. The Commonwealth is aware of no law within this Commonwealth which requires a parent's presence during an interview and/or during the advisement of rights, Your Honor. It is the totality of circumstances that the court must look to. Novak was alert. He indicated his comprehension of what was going on. His waiver was accepted. The totality of circumstances the Commonwealth would assert indicate that prior to that warning, he was not in custody. He was free to leave. At which time, he could have terminated the interview at his own decision.

Your Honor, the defense has made much of the issue with regard to what Detective Hoffman has referred to as ruses on the part of himself during the interview of Mr. Novak. I would submit to the court that the Supreme Court of the United States has indicated that police misrepresentation strictly in and of itself does not render a confession inadmissable. The fact that the police misrepresent evidence, while relevant, is insufficient to otherwise make a voluntary confession inadmissable.

I would cite to the court the Phrasier v. Cupp 239 U.S. 731, 1969 Supreme Court case. The Cupp case said that with regard to whether or not an individual is in custody must be based on a totality of circumstances. Mr. Novak was told that fingerprints had been found. He was told things that Detective Hoffman has testified were not truths. This is not an uncommon police practice. It has been utilized by police departments throughout the country. It has been subject to attack on

numerous occasions in a variety of jurisdictions. The North Carolina Supreme Court has admitted a confession which was obtained after the Police told a suspect that his fingerprints were found at the crime scene. Jackson v. State 304 S.E. 2d 134. In Jackson, the police told the defendant that they had recovered the fingerprints and other items of physical evidence which implicated him and asked him to explain.

Your Honor, other than the defendant being an adult, the Jackson scenario is factually similar to the case which is before the bar. Detective Hoffman told Shawn that his fingerprints had been removed from clothes and then asked him to explain. Hoffman said Novak had covered the bodies several days before they were found. None of these assertions were based entirely on the facts. They were fabrications in large part. Even so, they were only designed to extract the truth from Shawn Novak, who was competent and certainly of stable mind at the time.

This is consistent with the position exposed in Phrasier v. Cupp. Deception or trickery is acceptable so long as they are designed to produce a truthful statement from the defendant. The confession is not tainted by Hoffman's deception. In fact, the police in the case made substantial efforts to uphold and respect the constitutional principles and safeguards which they know they must follow beyond that the Commonwealth of Virginia in the case of Johnson v. Commonwealth decided on April 30, 1991, wherein a fifteen-year-old male was tried as an adult and convicted by a jury for murder, determined that the interrogating officer's prevarication and leading the murder suspect to believe an officer had obtained incriminating fingerprints was not reversible error.

Furthermore, in Wilson v. Commonwealth, Your Honor, a case just recently decided on January 21, 1992, by the Court of Appeals addresses the same issue with regard to trickery. I would note for the court a right on the part of an interrogating police officer does not in and of itself require finding that the resulting confession was involuntary. The fact that the police officer misrepresented statements that a witness had or had not made, while relevant, is insufficient in our view to make this otherwise voluntary confession admissible.

Your Honor, the law with regard to deception techniques on the part of police officers is reaching. in Connecticut, the case of Williams a 546 Atlantic 719, 943 question decided in 1988. The defendant was told not to lie about the rape under investigation since crime scene evidence would be likely to point to him. The officer, however, acknowledged that he had no actual knowledge of any scientific results.

Notwithstanding, that statement was admissible, State v. Manning. 506 S.2d 1094, a 1987 Florida case. The Florida appeals court upheld a confession received after the police officer falsely said Manning's medical records indicated he had venereal disease as well as the child molestation victim. In another Florida case the suspect's footprints were said by police to be found at the scene. Skin samples from the fingernails had matched his skin. The falsity of these statements did not vitiate the legitimacy of the confession that resulted from them. Burch v. State, 343 S.2d 831, a 1977 case. So I would submit to the court that the defense proposition that trickery in and of itself rises. to the level of invalidating an otherwise valid confession is not what the law says. That has to be taken in consideration with the totality of circumstances as they are presented to the court.

I would revert again to the evidence which is before the court. We know who Shawn Novak was. We saw him on the videotape. We've seen the transcription. We've seen his actions on the videotape. We've seen him smiling. We've seen the differences in moods that transpired throughout the interview. Notwithstanding, there is no evidence before the court that in any period of time that he did not know what he was doing, that he was not intelligent, he did not comprehend, that his cognitive skills were that of an intelligent sixteen-year-old male who, in fact, has had been interviewed on at least three or four previous occasions by the Police and knew, in fact, what was going on.

That coupled with the fact that his mother voluntarily left the room. She had asked Detective Hoffman with regard to what was going on. After Detective Hoffman made no promises to her and after she knew why her son was at the police department because the detective was interested in interviewing information with regard to the crimes that had been committed. Detective Hoffman's testimony indicated that he had talked to a lot of other Young men on more than one occasion. He was interested in receiving information with regard to this.

The defense paints the interview as saying that nothing happened after the mother left the interview except questioning that went to the defendant himself. I would ask the court to review the transcript very carefully, as I'm sure you will, Your Honor. I would submit that after the mother left the interview, the purpose of Detective Hoffman was trying to find out more information about the friends and what was going on and what had not gone on. Subsequently, because of the progress of the interview, he utilized the ruse to see where, in fact, the interview was going. At that point in

time, it led to another ruse. Subsequently, it led to the admission on the part of the defendant, wherein at that point the interview was stopped. Up until that point, Your Honor, the defendant was not in custody. Freedom of movement had not been restricted. He was free to leave. He had opportunities to leave. He went out and visited his mother. He knew what was going on. He was an intelligent young man as we've all heard from the witness stand.

Your Honor, in contrast -- and I gather from what defense has presented to the court that they suggest that there is some law within the Commonwealth of Virginia that mandates that a parent be present during an interview. I would submit that is not the law. In fact, a parent does not have to be interviewed. It is a circumstance to be considered. I would ask the court to look at Rone v. Wyrick which is found at 764 F.2d 532, a 1985 case coming out of Mississippi decided by the Eighth Circuit. They said that parental presence is not mandatory for a sixteen-year-old's confession to be used against him. Admissibility of the confession turns on due process and fundamental fairness under the totality of the circumstances. Notwithstanding that, Missouri law requires notification and assistance of parents while a juvenile is in custody. Even though the police failed to comply with this obligation, the confession was admissible. The Fourth Circuit has made the same determination with respect to comparable Maryland law found in Miller v. Maryland, 577 F.2d 1158, a Fourth Circuit case decided 1978.

Your Honor, the Virginia legislature imposes no similar obligation on police officers in the Commonwealth. Mrs. Novak's presence is therefore a privilege and not a right. She is not counsel to defendant. Any rights that he has run only to him. He

is the one that has the right to terminate an interview once she left the interview room and granted Detective Hoffman the opportunity to interview him without her presence. She consented to him being questioned -- that is, the defendant -- without her presence and the police. Shawn was not coerced and could have had his mother present if he had requested. He knew where she was. There was no question about it because he had gone out during the interview to visit her and returned to the interview room. He had gone out to have a doughnut. He smoked a cigarette. He was drinking a soda as we've seen on the tape.

Mrs. Novak's absence, Your Honor, the Commonwealth would assert has no bearing on the voluntariness and admissability of her son's confession. Once she consented to Detective Hoffman's request that she give permission for him to speak to the defendant, that in affect gave Detective Hoffman the permission to proceed with his interview in any fashion that he so desired.

The fact that at three quarters through the interview, as Detective Hoffman has testified to, he became very suspicious with regard to Shawn Novak, does not rise to the level of custodial interrogation. Only when the defendant in the case acknowledged that, yes, he killed the boys, was Detective Hoffman in a position to formally arrest and place him in custody. At which time, the law requires Mirandising the defendant. That right to voluntarily and knowingly waive one's Miranda rights runs to the individual, not to some party that exists on the outside. The Commonwealth will grant that there are jurisdictions that provide this right to juveniles. The Commonwealth of Virginia does not provide that right. Mrs. Novak's presence at the confession is clearly not required. Moreover, Virginia courts have not -- a

sixteen-year-old is clearly capable of executing a valid waiver. In order to be able to use statements obtained during a custodial interrogation of the accused, the state must warn the accused prior to such questioning of his right to remain silent and of his right to have counsel retained or present during the interrogation. That, Your Honor, also comes from Grogg. The right to counsel during a custodial interrogation and constitutional privilege against rights guaranteed or rights guaranteed to juveniles.

In re Gault, the Commonwealth would certainly not argue with that. Just as adults may waive their Fifth Amendment rights, so may juveniles. The Supreme Court -- and we've heard this phrase on numerous occasions as well -- the totality of circumstances approach is appropriate where the issue is whether a juvenile has made a valid waiver. I would submit to the court that there is no issue before the court whether or not he made a knowing and voluntary waiver. we've heard no testimony. The defendant has not said, I did not know what I was doing. I was not able to comprehend. My cognitive skills were such that I didn't know what was going on. He has voluntarily waived his rights once he was Mirandised. At that point, the interview became custodial and the interrogation completed. Out of his mother's presence he admitted committing the murders. At that point, Detective Hoffman briefly stopped the interview. Moments later he was read his rights. After that, the defendant proceeded to describe the killings in greater detail. His waiver was knowing and voluntary.

Now, Your Honor, there has been -- I believe the defense has suggested that after Mrs. Novak was advised of her son's confession, that there was subsequent inquiry that went on with regard to Shawn Novak. I

would submit to the court that there is no evidence before the court which indicated that is, in fact, true. Detective Hoffman has testified that as soon as he was advised or as soon as the person walked in and said, stop the interview, he stopped the interview. You see the transcript shows six to eight pages of transcript which occurred between the time he advised the defendant and when, in fact, gratuitously the police let Mrs. Novak essentially invoke his rights at that point in time. I would submit to the court that after Mrs. Novak was told of the events and advised of her son's rights, she requested that the interview stop so an attorney could be present. Police officers complied with her request.

Your Honor, there is A similar California case wherein I would ask the court to review in its case in re John S. It's 245 Ca. 17, a 1988 case. In that the court found a fifteen-year-old's waiver to be valid and his confession admissible against him despite a lack of parental consent. The court recognized the desirability of such consent, but still found that a mere failure of the authorities to seek the additional consent of an adult can not be held or outweighed in any given instance -- evidently supported finding that such a waiver was made.

Circumstances in re John S. case are strikingly similar to that which is before the court. John's parents were readily available. The defendant indicated that he understood his rights and wanted to waive them. He knew his parents were at the police station and never asked for their assistance. The court in that case examined the totality of the circumstances and determined that the juvenile's waiver was valid and the confession properly admissible. Failure of police to seek the additional consent of a parent did not invalidate or

otherwise affect a valid waiver made by the defendant.

In this case the police advised Mrs. Novak of her son's confession and promptly complied with her request to cease the interrogation. Perhaps this protocol is desirable on the part of the police officers where minors are involved. In this Commonwealth it's not required by statutory or case law, Your Honor. It is the Commonwealth's position that Detective Hoffman could have, in fact, continued with the interview because only can the defendant, in fact, invoke his rights as they exist under the constitution and not his parent. The Commonwealth is aware of no case law wherein it says a mother can invoke the rights for her child in the Commonwealth. There is no support for the contention that Mrs. Novak's assertion that her son's rights affects an apparently valid waiver which had already been made. Shawn's waiver was valid on the state and constitutional law. Mrs. Novak's action on his behalf under the circumstances of this case certainly are permissible, but they do not supercede or in way affect the knowing and voluntary waiver made by her son.

Now, Your Honor, I took a few notes during the defense's argument. I'm sure Mr. Brydges was probably doing the same thing during mine. Mr. Brydges makes much of the concept of suspect from the outset, accusatory, that type of language. In closing, Your Honor, I would relate to the court that none of those concepts rises to the level of custodial interrogation. I think the courts have been definitive in defining what, in fact, custodial interrogation is. Essentially, it is the restriction on the freedom of movement and beyond that as it relates to a human being able to go from one place to another. There was no restriction on Shawn Novak, not until he nodded his head, yes, I killed them. Yes, I killed Daniel and Scotty.

At that point in time, he was in custody, no question about it. Prior to that, Your Honor, he was free to leave. Defense would suggest that Shawn was unable to handle himself. I would submit to the court that there is absolutely nothing before this court to suggest that he was unable to handle himself. He knew what he was doing. He was jovial. It almost appeared that he was glad to see his mother leave. What reasons do we know. We can't get inside of his head. We know that he talked to the Police on at least three other occasions. We know that he had initiated a call to the hot line, thereby generating the first contact by he Police department.

Your Honor, in conclusion I think the Commonwealth's Position -- I don't need to be repetitive. Admissibility depends on the totality of circumstances which existed at the time that the defendant was interviewed and then subsequently the restriction was placed on his movement, and he was advised of his rights. I think it's clear from the evidence presented that he is of the age, intelligence, and experience to understand the rights of his waiving and the consequences of that waiver. Furthermore, I think it is apparent from the evidence that's been presented that trickery is just one of those things that one looks at with regard to the totality of circumstances. Legions of courts have determined that trickery standing alone is not sufficient to vitiate an otherwise admissible statement made on the part of a defendant.

Shawn Novak knew his mother was readily accessible. He knew she was there for him. She had come down with him. She had expressed her concern to Detective Hoffman. Shawn Novak heard his mother express her concern. Shawn Novak knew his mother was very concerned for him. She was suspicious herself, I would

submit to the court. He never asked for her. Never once did he ask for her through the course of the interview and subsequent interrogation, which occurred after the advising of rights by Detective Hoffman.

Your Honor, he made a voluntary, knowing, and intelligent waiver of his Fifth Amendment rights. His confession in the Commonwealth's position should be admissible. Furthermore, it was not a custodial setting. He was not under arrest. His restriction of movement had not been affected. Anything that transpired prior to the advisement of rights in and of itself was not a custodial interrogation. The law does not suggest that, in fact, he was in a custodial interrogation. The totality of the circumstances in this case do not suggest that he was in a custodial interrogation.

Accordingly, Your Honor, the Commonwealth's position is that the actions of Detective Hoffman on the morning of the 9th of March, 1991, were in keeping with the fine traditions with the Virginia Beach Police Department and the law of this Commonwealth and the law of the Supreme Court of the United States. The Commonwealth would ask that the court deny the defendant's motion to suppress the statement made by the defendant, Your Honor. Thank you.

THE COURT: Mr. Brydges, I was going to ask whether you or Mr. Mahan wanted to argue the motion in support of or prohibiting the death penalty in the case.

MR. BRYDGES: I think Mr. Mahan is going to argue that. If I may just respond briefly to Mr. Zanin. I didn't take any notes as Mr. Zanin indicated to be honest with you. Your Honor, when I heard him argue I thought I had the wrong trial here. I didn't recognize the Novak case from his responses to my argument. Obviously, we

were talking about two different things when we were arguing this case. First of all Your Honor, if the Fifth Amendment means anything and if this confession is not suppressed, I submit it means nothing. Given the totality of circumstances here it can mean nothing. Mr. Zanin's argument would indicate that much the same as a Fourth Amendment violation when somebody says, I didn't have a proper warrant or proper cause to search your house and found contraband, everything is all right. What I'm hearing Mr. Zanin say is, we've got a confession, throw caution to wind. Everything else is unimportant.

Now, let's talk about the totality of circumstances. We read something entirely wrong. I'm reading from Page 27 of the transcript as Your Honor was provided with when this lad was cajoled. That's the only word you can use. We would like you out of this room, Mrs. Novak, because -- saying to himself, it's going to cramp my style to have you here protecting your son. Here's what he was saying to her. Don't accept my word for this. Your Honor can read this on Page 27. It reads, there are a couple of sensitive areas not dealing with these kids. The dead children, not dealing with them. Would not a parent hearing that from a fine police officer in Virginia Beach assume that the question of zeroing in on his guilt in the crime as a suspect would not be addressed? I would, and I've been around a long time. I would say, all right, officer, if that's what you are going to ask him about, his friends, I'll go ahead and wait outside. Call me if that situation changes.

Now, then he also says that this entire thing was a voluntary arrangement. I call your attention, Your Honor, to the testimony of Mrs. Novak, that she was called twice to find that these officers were in her home, in her home. She came there and said, Officers, I don't

want you talking to my children unless I'm here. Fine. Did she not have every reason in the world to believe from that that they were not going to stop short of arresting this young man and take him into custody or whatever else that she could contemplate that was bad, if she did not do their bidding.

She is a responsible parent and citizen. She says, I'll bring him down, but it's going to be by my rules. My rules are that I don't like secrets. I want everything recorded. I want to be there -- totality of circumstances. All right, Mrs. Novak. That's what we're going to do. So they begrudgingly allow her to go into that interrogation room. You could tell from Mr. Hoffman's demeanor that he was uncomfortable with that. He wasn't able to get into his ruses and deception and take advantage of a sixteen-year-old, barely sixteen-year-old young man. He wasn't able to do that with a parent there because she had told him that if you get into that, we're going to stop this interview, and I want to get him a lawyer.

So he was so uncomfortable with it, his style was so cramped that he tells her on Page 27, You go ahead out. I'm not going to ask him about the murders at all. The only reason I don't want you here is about the fact that Young and Cleapor were drinking beer with him, plies him with cigarettes. I disagree with Mr. Zanin. Nothing after that would indicate he was after Cleapor or Young or Joe Schmoe or anybody else. He's after him. Each and every question throughout leads up to that.

I have a big picture, he said towards the ends of that interview or towards the time when he got him to make this statement. I want to go and see my mother because I want to go home. How far do you think he would

have gotten past that door? How far would Shawn Novak have gotten if he said I want to run over to the 7-Eleven at that stage when he was right at the point where he was going to get him to confess. Totality of circumstances. We've got a juvenile who was never advised of his rights. I've got a mother who was there to protect his rights and had manifested that she wanted to protect his rights. In addition to that, we've got deception and fraud and deceit and ruses. We've got blatant lies, not only to him -- if you believe the Commonwealth's case law, even in a juvenile case you can lie. Maybe that's true -- totality of circumstances.

The totality of circumstances here is that he had a mentor. He had a parent. He had someone who was going to get him a lawyer should he need one. She was there in that building, had told this interrogating officer that, it seems to me, intended to protect his interests at all costs. His dad was not here. I'm all he's got. I'm here to protect him. Not to worry, Mrs. Novak. We're not going to ask him anything sensitive about these murders. Go on out and go home if you like. You're not to worry. That's deception. That's deception to the mother. That's deception, Your Honor, to the system.

How in heaven's name can he say during the course of that interview from the time that mother left, ten or fifteen minutes later with this business about fingerprints, and I've got independent witnesses who saw you here and saw you there. Let's talk about maybe you found the bodies before, suggesting everything in the world to him that this boy wasn't in confinement and wasn't a suspect and that the investigation was totally accusatory.

Now, Your Honor, the case that came out of this court -- I think it's Foster against Commonwealth. I believe it's

Judge Hanson's case or somebody recanted his decision even though he asked for a lawyer. He wanted to make a statement, and perfectly clear that's the law. In that case -- that's Foster against Commonwealth, 8 Va. App. 167. Page 173 they quote Johnson against Zerbst case, 304 U.S. 458. Any evidence that the accused was tricked, threatened, or cajoled into a waiver whether, of course, show that defendant did not voluntarily waive his privilege. In every single case that the Commonwealth has cited and every one that I've got here the basic precept is that this person, juvenile, or adult were amply advised of their rights. He never had that privilege, never had it.

He had a mother that's telling this officer, this interrogating officer, this boy might freak out. Now, Shawn, don't freak out in here with your mother not here. He said, All right. She knew her son. She left only because she was told he wouldn't be interrogated about the subject that she was so concerned about, and that he was. He led him right down -- Mr. Hoffman did a good job. He gave the old, That's cool. You and I are buddies, son. You and I are okay, son. Have a cigarette, son. I'm not going to trick you, son. That was a lie in and of itself. The whole thing was a trickery. Taking advantage of this boy's inexperience, whether he's a C student in advanced English or not. He was in an environment in which he was uncomfortable. You can see that in that tape.

He, sobbing with his head in his hands, having told the officer exactly what the officer wanted to hear and what he was getting at in the beginning. He shoved this paper up under his hand and with a tear dripping down and says, Sign that. Now, you've been advised of your rights. Everything is peachy keen now. You're advised of your rights. The totality of this occasion and the

circumstances surrounding it is the grossest thing I have ever seen in my life. Subsequent courts that God forbid should review this I think can reach no other conclusion. Thank you, Your Honor. I have nothing further, Your Honor.

THE COURT: Mr. Mahan?

MR. HUMPHREYS: Your Honor, if we're going to deal with that other motion, just for the record I received, of course yesterday, the some forty-page brief. Mr. Zanin and I attempted to digest it with some success. I'll just state that the Commonwealth's position initially is that this motion is premature. The court has previously ruled over the Commonwealth's objection that the court intends to impose punishment in this case assuming there's a conviction. Given that situation, I really see no earthly reason why we need to resolve whether death is even an appropriate punishment under any circumstances at this pretrial stage of the game. It should be more appropriately determined if and when we reach that point. That would be our position initially. If the court wants to argue the merits this early, then we are prepared to try and deal with it, although I will apologize in advance for the inability to file a response brief. That was only because we received their brief yesterday.

THE COURT: All right. Well, let me just acknowledge Mr. Mahan filed a forty-two page memorandum with the court yesterday. I can certainly understand if you haven't had an opportunity to go through it in great detail. If you're requesting a continuance on this matter to --

MR. HUMPHREYS: My position is this is not the appropriate time to take it up. I'm not trying to excuse

or use the basis that we received the memorandum of law yesterday. Our position is that I do think it's premature to deal with it at this point. Many of these arguments quite frankly have been made and been ruled on in other Supreme Court cases. Counsel has raised one argument which I think is very novel. We can deal with it at this point. I just don't see any reason why we need to frankly. We're talking about an issue of punishment, which the court if it becomes appropriate and if there's a conviction in the case, the court intends to impose. That would seem to me to be the appropriate time to argue that or at least sometime subsequent to a verdict. That would be prior to the court's imposition of punishment. I see no reason to deal with it this early on. It's premature.

MR. MAHAN: Judge, I am fully cognizant of the fact that the Commonwealth has had precious little time to formulate a response to the brief that I filed. I don't want

EXHIBIT: VIDEOTAPE OF PREINTERVIEW CONVERSATION BETWEEN DETECTIVE HOFFMAN AND SHAWN NOVAK

Note: The videotape attached is not the same videotape that was admitted into evidence. To the best of counsel's knowledge and belief it is an exact replication of the videotape introduced into evidence in the record.

Supreme Court, U.S.
FILED
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CLERK

No. 96-61

In The

Supreme Court of the United States

October Term, 1996

SHAWN PAUL NOVAK,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Is the petitioner's fact-specific claim that his confession violated the Fifth Amendment worthy of certiorari review where:

   a. the petitioner voluntarily went to the police station with his mother and was not in custody until after he said he committed the crime and was then Mirandized before he made a further statement?

   b. the petitioner's attempt to manipulate the police simply backfired and his statements clearly were voluntary?

II. Even if the petitioner's confession had been improperly obtained would its admission have been harmless beyond a reasonable doubt?

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STATEMENT OF THE CASE

Novak confessed to the March 4, 1991, murders of nine-year-old Danny Geier and seven-year-old Scotty Weaver on March 9, 1991. (Pet. App. A45-132). A juvenile petition was issued that same day, charging the 16-year-old Novak with capital murder in that he had premeditatedly killed the boys during the same transaction in violation of § 18.2-31(7) of the Code of Virginia. The juvenile court held a hearing pursuant to Virginia Code §§ 19.2-169.1 through 169.5 and then transferred Novak's case to the Circuit Court for the City of Virginia Beach for trial as an adult. A circuit court jury convicted Novak as charged on March 9, 1992. On May 4, 1992, the circuit court judge sentenced Novak to life in prison for the capital murder, and entered final judgment on June 15, 1992.

[1] Page citations herein either are to the petitioner's appendix (Pet. App. ___), the suppression hearing transcript (Supp. Tr. ___) or the trial transcript (Tr. Tr. ___).

STATEMENT OF FACTS

"Charles Manson was [Novak's] idol and he wanted to be just like him." (Tr. Tr. 485-487). Novak was known to roam the area of the Wadsworth Navy Housing Complex and to always carry a "buck" knife. (Tr. Tr. 490). About 5:30 p.m. on Monday, March 4, 1991, Danny Geier and Scotty Weaver were seen in Novak's company near some woods behind a McDonald's. (Tr. Tr. 476-484).

Neither Danny nor Scotty ever returned home, and their bodies were found by a search party the next day about 3:30 p.m. under "stacks of pine tree limbs." (Tr. Tr. 492-495). The medical examiner concluded that Scotty had "died as a result of . . . partial decapitation, the severing of the spinal cord in a vital area, which is between C3 and C4" (App. 800) and also had suffered three other incapacitating stab wounds (Tr. Tr. 978); Danny had "died as a result of blood loss from the severed carotid artery and vein as a result of the [six inch long] cutting wound of the neck," had suffered several stabbing type wounds and a blunt force injury to the head. (Tr. Tr. 573-577).

Shortly after the boys' bodies had been found on March 5, Novak "came into [Shane Young's] house and began to tell us that he found the children when they were at the search party. * * * He said [the bodies] were covered up with brush." (Tr. Tr. 548-549; 552-554). The members of the search party, however, were certain that Novak was not at the scene. (Tr. Tr. 503-504).

Novak told a classmate on March 6 how he had supposedly found the bodies and that the boys' throats had been cut. (Tr. Tr. 600). Yet, later that day, he "wanted

to know if the way the boys had died had been publicly announced yet." (Tr. Tr. 554).

When he told his friend's mother that he had seen the boys around 5:00 p.m. on March 4, she dialed the "hotline" the police had set up about the case and handed the phone to Novak, who then left his name and address. (Tr. Tr. 567). As a result of Novak's call to the "hotline," Virginia Beach Police Detective S. W. Hoffman interviewed the petitioner the evenings of March 6 and 7 while his mother voluntarily waited in the lobby. Novak was but one of several juveniles the police had talked to about the two boys. Novak was not upset after the interviews, and his mother said "he felt good that he was being able to help." (Supp. Tr. 20-21).

After these sessions, the detective had no reason to think that Novak was involved in the murders. (Tr. Tr. 622). Hoffman, however, had "learned through other interviews that [Novak] was a wealth of information throughout the neighborhood." (Tr. Tr. 622). The police thus asked Mrs. Novak if she and her son could return for additional questioning on March 8, but she could not arrange it. The officer just said, " '[T]hat's okay. We understand. It's getting too late to do it tonight anyway. They asked [her] to bring him on Saturday morning.' " (Supp. Tr. 23).

On March 9, Hoffman "wanted to talk to [Novak] about anything he may have seen or anyone that he may have seen in the area." Numerous breaks of up to 15 minutes were taken during the interview, during which Novak was free to roam the station by himself and was allowed to use the restroom facilities. (Tr. Tr. 622-623).

Mrs. Novak remained in the interview room the first hour, but then agreed to go to the lobby because the officer felt Novak would be more likely to tell him about his friends' habits if she were not present. She privately asked her son if "he would freak out" if she left, and he smilingly said "No." After Mrs. Novak had left the room, the petitioner went to the lobby on at least one occasion to tell her he was alright. (Supp. Tr. 25-26; 29).

Because of several statements and discrepancies in Novak's answers about the boys, however, Hoffman eventually tossed out to him, "You killed them, didn't you?" Novak paused, then nodded his head in the affirmative. When Hoffman repeated, "You killed Scott and Daniel?" Novak responded, "Yes." Hoffman read Novak his *Miranda* rights, and the petitioner indicated that he understood his rights and that he wanted to talk to Hoffman. Novak then detailed how he had gotten angry when one of the boys had tried to grab his knife and had chased Danny and Scotty down and stabbed them to death with his "buck" knife. (Pet. App. A106-110). The entire interview had lasted about two hours. (Tr. Tr. 622).

Officer James D. Price executed a search warrant at Novak's residence and found his knife lying on top of the dresser in Novak's bedroom. (Tr. Tr. 675-677). He also recovered a book entitled "Serial Killers" from Novak's room. (Tr. Tr. 680). Expert forensic testimony established at Novak's trial that the object which had made a bloody impression on Scotty Weaver's blue jeans either was Novak's knife or "another object having exactly the same features" (Tr. Tr. 714) and that the branches covering the boys' bodies had been cut by Novak's knife. (Tr. Tr. 728-730).

Dr. Lee Mingione testified that Novak evinced no unusual personality traits for a sixteen-year-old and showed no elements of schizotypia and that Novak would have known right from wrong when he killed the boys. (Tr. Tr. 927-932). Dr. Paul Mansheim, who was board certified in child psychiatry (Tr. Tr. 983), found "[n]o psychological reason or no psychological disorder present that would have caused [Novak] not to know the difference between right and wrong for anything he might have done on March 4, 1991" and that no psychological disorder prevented him from understanding the criminality of his acts. (Tr. Tr. 1000). Dr. Mansheim also stated that no one could credibly claim that Novak acted in a sudden frenzy or impulse when he killed the two little boys. (Tr. Tr. 1017).

REASONS WHY THE WRIT SHOULD BE DENIED

Summary Of The Argument

It simply is not true, as the petitioner asserts, that the Virginia courts approved in this case a confession where the petitioner's "parent was deliberately excluded, against the parent's will, and without the knowing and intelligent waiver of her presence by the child." (Cert. Pet. 26-27). To the contrary, both the trial and appellate courts recognized that the absence of a parent is a relevant factor to be considered in deciding the voluntariness of a juvenile's confession. *See* Supp. Tr. 192; *Novak*, 20 Va. App. at 387, 457 S.E.2d at 408-09. Both courts just found that the petitioner and his mother had agreed that she

could leave the interview room and that his confession was otherwise voluntary.

As shown by the record and found by the trial court, Novak is a highly intelligent and "street wise" sixteen-year-old, who was only questioned by the police after he had brought himself to their attention, had attempted to manipulate the situation to his advantage and had then twice voluntarily gone to the station house for questioning with his mother before he confessed during the third, also voluntary, interview. The lack of police control over Novak during the culminating interview is evinced by the fact that the officer actually would have to go and look for Novak in the station house after their breaks.

Additionally, the evidence of Novak's guilt other than his confession was overwhelming, including expert testimony that the petitioner's "buck" knife matched a bloody imprint on the jeans of one of his young victims and had cut the branches used to cover the dead boys' bodies. Any error surely would have been harmless beyond a reasonable doubt.

In truth, what this Court has before it simply is the application of an established legal rule to the facts of a particular case, which is the situation least likely to warrant certiorari review. *See* Rule 10, *Rules of the Supreme Court of the United States* ("certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule.") As the trial judge noted, "viewing the two and a half hours of [the] tape were extremely helpful to me in making this determination. It presented a very, very comprehensive picture in my mind as to what the totality of the circumstances were. . . . "

(Supp. Tr. 194). This Court does not grant certiorari merely to second-guess such determinations. *See United States v. Johnson*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.). The petition should be denied.

I(a). *The Miranda Issue*

Mrs. Novak acknowledged at the suppression hearing that her son had not been restrained in any way during or after the two previous interviews with the police; she admitted the police had contacted her before they talked to her son; she admitted she had given the police permission to talk to her son each time; she admitted that Det. Hoffman told her before she left the interview room on March 9 that he wanted to get into some sensitive areas with her son, not just ask him about his friends; she admitted that she was allowed to talk privately with her son before deciding to leave the room; she admitted Novak agreed that she could leave; and, she admitted Novak was not angry or upset at being interviewed on March 9. (Supp. Tr. 36-41). Mrs. Novak further acknowledged that her son had no difficulty with communication, having scored in the 95th percentile in reading and in the 99th percentile in language skills. (Supp. Tr. 41).

The interview between Det. Hoffman and Novak was videotaped, and there were no secrets about what went on in the interview room. (Supp. Tr. 49). The detective had no idea he was going to arrest Novak when Mrs. Novak and her son arrived at the station on March 9 (Supp. Tr. 59), and this still held true after Mrs. Novak

had left the interview room. (Supp. Tr. 61). ***The detective testified without refutation that Novak was free to leave up until the point when he actually confessed to the murders.*** (Tr. Tr. 624).

Detective Hoffman freely admitted having used some ruses during the interview, including telling Novak the police had gotten his fingerprints off one of the boy's jackets and that they had a witness who had seen him with the boys (which turned out to be true). (Supp. Tr. 51-52). Hoffman, however, had only decided to use the ruses "later while questioning [Novak]" because of some things the petitioner had said. (Supp. Tr. 54). If Novak had emphatically denied Hoffman's suggestions, it would have indicated "that he didn't have anything to do with it." (Supp. Tr. 62). Hoffman simply was "trying to judge whether [Novak] was holding something back by his reaction to these questions with this fictitious information." (Supp. Tr. 62).[2]

Finally, the psychiatric experts who had watched the videotape of Hoffman's interview of Novak saw no evidence that Novak suffered from delusions. (Tr. Tr. 999). Novak was not acting out a fantasy during the interview and, according to even the defense psychiatrist, the interview "illustrated Shawn in a fairly normal mode." (Tr. Tr. 888).

Miranda warnings are required by the Fifth Amendment only when a person is subjected to "custodial interrogation." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

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[2] These were the only two "lies" the petitioner complained about at trial. (Supp. Tr. 5).

This rule also is applicable to juveniles. *Fare v. Michael C.*, 442 U.S. 707 (1979). Whether someone is "in custody" depends upon "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarthy*, 468 U.S. 420, 442 (1984). "[T]he ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. ___, 114 S. Ct. 1526, 1528-29 (1994) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

Even assuming for the sake of argument that Novak was the "focus" of the investigation – which Detective Hoffman denied and the trial judge found as a fact was not the case – this still would not mean that Novak was subjected to a custodial interrogation before he had admitted his guilt. *See Beckwith v. United States*, 425 U.S. 341, 349 (1976). Nor does someone have to be "Mirandized" just because they are interviewed in a police station. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

The circumstances surrounding an interrogation are "distinctly factual," *Thompson v. Keohane*, 515 U.S. ___, 116 S. Ct. 457 (1995), and a trial court's subsidiary factual findings are binding on this Court. *See Hernandez v. New York*, 500 U.S. 352, 365-66 (1991); *Miller v. Fenton*, 474 U.S. 104, 110-12 (1985). Here, the trial court made the following factual findings about Novak's questioning:

- Novak was being interviewed along with many others to see what information he had;
- The interview was more of a "fact finding" exercise than an interrogation;

- Det. Hoffman told Novak he was not a suspect at the start;
- Novak was never told he could not leave;
- Novak never asked to leave or to terminate the interview;
- Novak was not deprived of his freedom in any significant way during the interview; and
- Novak was "Mirandized" after he nodded affirmatively that he had killed the boys.

(Supp. Tr. 187-189).

While the ultimate question of whether a defendant was "in custody" for purposes of *Miranda* is a mixed question of law and fact allowing this Court to make the final decision, *see Thompson v. Keohane*, it still is noteworthy that the Virginia Court of Appeals found that the trial court's conclusion that Novak was not in custody until he initially admitted committing the murders (Supp. Tr. 189) had "abundant support" in the record:

> Here, defendant, accompanied by his mother, had twice voluntarily come to police headquarters for interviews. During a third visit, under like circumstances, defendant confessed to the offenses. He had been previously advised that he was neither under arrest nor a suspect, and Detective Hoffman only wanted to ascertain "anything . . . or anyone that [defendant] may have seen in the area."
>
> The interview was conducted in a carpeted room, "approximately ten-by-twelve," furnished with a table and several chairs. A "one-way

> mirror" permitted visual access from an adjoining room. Although defendant's mother was present at the inception of the interview, Hoffman persuaded her to leave the room, insisting that defendant could then more comfortably discuss "his friend's whereabouts" and "habits." Defendant was aware, however, that she remained nearby, still in the building.
>
> ***Until the confession, defendant was permitted to move about the building and "was . . . free to leave at anytime."***
>
> This evidence, considered with the entire record, including a video tape of the interview in issue, provided abundant support for the trial court's determination that defendant was not "in custody" at the time of his initial admission of guilt and prior *Miranda* warnings were, thus, unnecessary.

Novak, 20 Va. App. at 385-86, 457 S.E.2d at 408. The Court was correct.

I(b). *The Confession Was Voluntary*

Whether a confession was obtained voluntarily depends on whether the statement was the "product of an essentially free and unconstrained choice by its maker" or whether the maker's will "has been overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). In answering this question, the courts look to a "totality of the circumstances" standard, which also applies when the defendant is a juvenile. *See Fare v. Michael C.* Although whether a statement is voluntary ultimately is a "mixed," rather than factual, question, the

trial court's subsidiary factual findings are entitled to a presumption of correctness. *See Miller*, 474 U.S. at 110-12.

A lie on the part of an interrogating police officer does not, of itself, require a finding that a resulting confession was involuntary. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (even outright falsehood by a police interrogator is but one factor to be considered in evaluating totality of the circumstances). "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda's* concerns." *Illinois v. Perkins*, 496 U.S. 292, 297 (1990).

As for Novak's complaint that his mother was not in the interview room when he confessed, this not only was voluntary on the Novaks' part, it also was typical of his previous interviews with the police. It is "well established," moreover, that the mere absence of a parent does not, by itself, render a juvenile's waiver involuntary. *Grogg v. Commonwealth*, 6 Va. App. 598, 613, 371 S.E.2d 549, 571 (1988) (citing *United States v. White Bear*, 668 F.2d 409, 412 (8th Cir. 1982) (presence of parent not necessary to obtain valid confession of juvenile). The inquiry, after all, is not whether the parent's will was overborne, but the defendant's.

As the trial judge's factual findings make clear, this was not the case here:

> In this case . . . it's clear to me that Shawn Novak was highly intelligent. He was a high school student. He was articulate in his answers to the questions being asked of him. He obviously understood everything that was being

asked. He gave appropriate responses to those questions.

* * *

Shawn was a very willing participant. * * * He came down voluntarily to the police department. He participated in these interviews ostensibly with the motivation to try and aid the police.

Other factors include the use of drugs or alcohol, and there's absolutely no evidence of that. The emotional or mental disability of the individual, and there's absolutely no evidence of that. The deprivation of physical comforts – that conjures up long, isolated interrogations late at night. ***This is on a Saturday morning with the defendant's mother present, smoking cigarettes and drinking Pepsi, smiling, and obviously in complete control of himself and obviously with a full understanding of the interview process and what was being said and why he was there.***

I don't know of any psychological pressures in this case. Threats or promises of leniency – there's absolutely nothing along those lines. * * * [T]his was a rather benign interview in all its respects. The defendant was there voluntarily with his mother. It lasted certainly no longer than two and a half hours with several breaks in between. There was never any attempt by the defendant to leave; and, frankly, my impression from watching the tape and listening to the interview is that if the defendant had said, I'm through, I want to leave, he would have left.

> [T]hat tape . . . presented a very, very comprehensive picture in my mind as to what the totality of the circumstances . . . So after considering all of the evidence and what has been referred to as the totality of the circumstances, the court finds that the statement was a voluntary statement made by the defendant without any fear or threat or intimidation of any kind whatsoever.

(Supp. Tr. 189-195) (emphasis added).

Just as adults may waive their Fifth Amendment constitutional rights, so may juveniles. *Fare*, 442 U.S. at 724-25. The record establishes beyond question that Detective Hoffman had apprised Novak of his "Miranda" rights, that Novak indicated that he understood them, that Novak never asked to speak to his mother before confessing – much less to a lawyer, and that he acknowledged his rights and signed a waiver form. (Pet. App. A106-107; Supp. Tr. 57-59; Commonwealth's Exhibit I and 2 – advisal form and videotape). Given the trial court's subsidiary factual findings, this Court cannot reasonably say that Novak's confession was not voluntary.[3]

II. Error, If Any, Was Harmless

It is manifest that the refusal to suppress Novak's incriminating statement was proper. Even if it had been

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[3] The petitioner also asserts a reliance on the Sixth Amendment, but presents no such argument. Any such contention, in any event, would be unavailing as no " 'adversary judicial criminal proceedings' " had been initiated, *see United States v. Gouveia*, 467 U.S. 180, 188-90 (1984), and Novak does not contend that he ever asked for counsel, much less that any such request was not honored.

error to allow his confession to be admitted, however, any such error clearly would have been harmless beyond a reasonable doubt given the other evidence introduced at his trial. *See Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991) (harmless error rule adopted in *Chapman v. California*, 386 U.S. 18 (1967), applicable to unconstitutional confession).

A friend's mother who knew Novak well testified that "Charles Manson was his idol and he wanted to be just like him." Novak was the last person seen with the boys at the edge of the woods where their bodies were found the next day. Novak had lied about being a member of the search party and, although not present when the bodies were found, had told his friends how the boys' throats had been cut and that their bodies had been covered with branches. Novak was known to carry a large "buck" knife, and the boys had, in effect, been decapitated by a large knife. The forensic evidence was compelling, showing that Novak's knife was an exact match to an impression made in the blood on Scotty Weaver's jeans and had been used to cut the branches covering the boys' bodies. Psychiatric evidence, moreover, showed that there was nothing which would have prevented Novak from knowing right from wrong or from understanding the criminality of his acts when he killed the children.

Any error in admitting Novak's confession surely would have been harmless beyond a reasonable doubt. *See Fulminante*.

CONCLUSION

This Court should deny Shawn Paul Novak's petition for a writ of certiorari to the Supreme Court of Virginia's judgment refusing his appeal.

Respectfully submitted,

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In The Supreme Court Of The United States

OCTOBER TERM 1996

SHAWN PAUL NOVAK,

Petitioner,

V.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

1. The argument concerning the exclusion of the child's mother from the police interrogation of her son.

On pages 5, 6 and 12 of his Brief in Opposition, respondent addresses petitioner's due process argument regarding the exclusion of Mrs. Novak from the interrogation of her son. Respondent argues as if this were a passive act on the part of the authorities in failing to notify the mother rather than the active employment of deceit and manipulation by an agent of the state, Detective Hoffman, in excluding the child's mother from the police interrogation. Mrs. Novak told Detective Hoffman that she wanted to be present and, indeed, was present at the beginning of the interrogation of her son but was later deceived by Hoffman into leaving. The distinction is between merely failing to notify a parent and actively lying to a mother in order to deliberately exclude her. It is this refusal by Detective Hoffman to recognize the right of a juvenile to have his parent present, as expressed to him on behalf of the juvenile by the parent, that violates the child's fundamental right to due process of law and makes the resulting confession per se coercive. Whether or not he's in custody, once a juvenile has expressed to an agent of the state his right to have a parent present during a police interrogation, either directly by the juvenile or for the juvenile by his parent, then the state must recognize that right and not continue to actively manipulate and deceive both mother and son

in order to force a separation. This Court need look no farther than the actions of Detective Hoffman in separating mother from son in order to find police action unsupportable under fourteenth amendment due process.

This Court has long recognized the inherent strength of the parent-child bond:

> "The history and culture of western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."

Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

Likewise, this court has recognized the right of a parent to speak and act on behalf of a minor child. In the landmark decision concerning juvenile rights, In Re Gault, 387 U.S. 1 (1966), the Court uses language suggesting a parent-child unit when discussing constitutional rights that might be invoked by either the juvenile or the parent on behalf of the juvenile:

> "This knowledge [that Mrs. Gault, the mother, could employ counsel for her son] is not a waiver of the right to employ counsel which she and her juvenile son had, as we have

> defined it. They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless they chose waiver."
>
> Id. at 42

The logic behind recognizing the authority of a parent to exercise rights on behalf of a juvenile is self-evident: a threshold issue in a juvenile's exercising a constitutional right is the recognition by the juvenile that he possesses the right. The parent is the proper adult to assist and guide the child, and at times to act on behalf of the child, in the exercise of constitutional protections, just as the parent is recognized by law to be the proper adult to act on behalf of a juvenile in many other legal matters. Mrs. Novak, then, properly exercised her son's right to have her present at his police interrogation, a right not honored by Detective Hoffman.

Juveniles, by virtue of their tender years and limited life experience, occupy a unique status when it comes to constitutional protections. As the Court recognized in Haley v. Ohio, 322 U.S. 596 (1948), special care must be taken when a juvenile is confronted by the power of the

state during a police interrogation:

> "The age of the petitioner [15 years old], the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction."
>
> Id., at 600-601.

The presence of a parent certainly does much to ensure the constitutionally-mandated protections of a juvenile confronted with a police interrogation, and levels the field somewhat between the individual and the powers of the state:

> "[The juvenile] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admission. He would have no way of knowing what the consequences of his confession were without advice as to his rights - from someone concerned with securing him those rights - and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult

> advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights."

Gallegos v. Colorado, 370 U.S. 49 (1962).

In this case, the child had with him at the interrogation his mother, an adult present expressly for the purpose of making sure the child did receive the protections guaranteed to him by the United States Constitution. She would have asserted her son's constitutional rights on his behalf. (Petition, A148)[1]. When she was manipulated out of the interrogation room, the child's constitutional protections effectively left with her.

Certainly no other adult present or looking on showed any concern for ensuring petitioner's constitutional protections. In fact Detective Hoffman, incredibly insisting that petitioner was not a suspect, throughout the interrogation

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[1] Citations designated "Petition" are to pages of the Petition for Writ of Certiorari on file with this Court.

employed a variety of techniques to ensure that the child would neither recognize nor assert his constitutional rights. He consciously and purposely deceived the child by setting himself up as an adult that the child could trust and then using this position of trust to ensure that the child would neither acknowledge nor exercise his constitutional rights.

It is of critical importance in this case that, regardless of whether or not Miranda rights were constitutionally mandated at the beginning of this interrogation, no Miranda warnings were given the child until after his confession when, of course, any benefit to be gained by the child's exercise of his rights was minimal at best. The fact that Detective Hoffman chose not to inform the petitioner of his rights prior to his confession meant that the child had absolutely nothing to fall back on once his mother was manipulated out of the interrogation room. Had he received his Miranda rights earlier, an argument could be made that at least the child was aware of his constitutional rights. In this child's confrontation with the state, we have not even that minimal level of protection. We are left, then, with a reduction of substantive constitutional rights to meaningless formality, and "[f]ormulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law ...". Haley, supra, 322 U.S. at 601. As in Haley, this case presents a "...situation [that] was so contrived that

appreciation of [the child's] rights and thereby the means of asserting them were effectively withheld from him by the police ...". Id., at 607, Frankfurter, J., concurring.

Of all the cases discussing the meaning of an individual's rights against self-incrimination guaranteed by the United States Constitution, perhaps Gault still says it best:

> "The privilege against self-incrimination is, of course, related to the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and - in a philosophical sense - insists upon the equality of the individual and the state. In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the

> state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction."
>
> Gault, supra, 387 U.S. at 47.

If the noble promise of Gault is to have any meaning in a modern world, the police actions employed here cannot stand.

Finally, it is noteworthy that respondent does not rebut petitioner's claim that Virginia stands alone in finding a juvenile confession voluntary where the parent was deliberately excluded from the interrogation against the parent's will and absent a waiver. Respondent does make the unsupported allegation that Mrs. Novak voluntarily left the interrogation room. While this allegation may be true to the extent that the child's mother was not physically subdued and removed from the interrogation room, it is certainly misleading. The interrogation transcript and video tapes speak for themselves on the issue of Mrs. Novak's exclusion from her son's interrogation. Respondent's claims to the contrary notwithstanding, neither the trial court nor the Virginia Court of Appeals refuted the conclusion that Mrs. Novak's act of leaving the interrogation room was solely the result of Detective Hoffman's deceit and manipulation.

2. Potentially misleading conclusions and statements of fact.

Throughout his Brief in Opposition, respondent baldly and without authority misstates facts and draws misleading conclusions. Obfuscation is not an appropriate reply to this petition. Petitioner addresses two of the more egregious misstatements.

On page 6, Brief in Opposition, respondent states without authority that petitioner was a "street wise" sixteen-year-old who attempted to manipulate his contacts with the police to his advantage. On the contrary, petitioner had just turned 16 and lived at home with his parents (Petition, P. A133), attended public high school (Petition, P. A126), and had no previous contact with law enforcement authorities. (May 4, 1992 Trial Transcript P. 131, Joint Appendix on Appeal P. 1208). The record is devoid of any evidence that petitioner attempted to manipulate his interrogations by the police.

On page 7, Brief in Opposition, respondent misleadingly implies that Mrs. Novak knew Detective Hoffman was going to question her son about the crimes by stating that "...she admitted that Detective Hoffman told her before she left the interview room on March 9 that he wanted to get into some sensitive areas with her son, not just ask him about his friends ...". Again, this allegation is belied by the transcript of the interrogation - the transcript speaks for itself about what Detective Hoffman told

Mrs. Novak. (Petition pp. A60 - A63).

3. The error was not harmless

Respondent argues that error, if any, is harmless beyond a reasonable doubt. It is hard to imagine that any illegal confession could ever be harmless error beyond a reasonable doubt. Absent the confession, the only direct evidence linking petitioner to the crimes in this case was testimony that either petitioner's knife or one like it left a bloody imprint on one of the victim's clothing and was used to cut branches to cover the body. No other forensic evidence linked petitioner to the crimes, no fingerprints, no footprints, no blood or other trace evidence. The confession was crucial to the conviction. And finally trial prosecutor Robert J. Humphreys, presumably in the best position to judge the strengths and weaknesses of his own case, stated that "[w]ith no confession, there is no case. There's a lot of suspicious circumstantial evidence. Standing alone, it was not enough to convict."[2]

CONCLUSION

For the foregoing reasons and those set forth in his petition, petitioner submits that certiorari should be granted.

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[2] K. DeRochi, "Judge upholds police tactics in Novak Case," Virginian-Pilot (Norfolk, VA.), February 5, 1992 at A1.

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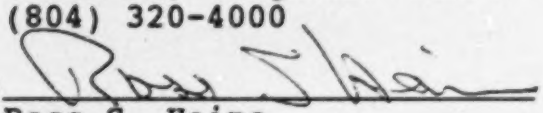
By: 
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